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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA., COMERCIAL ESTRELLA LTDA., and CONFECCIONES Y TEJIDOS NACIONALES LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE SECOND CIRCUIT ERR IN DISREGARDING THE EXPANDED AMENDED DEFINITION OF "INTERCEPT" AND "DEVICE," SPECIFICALLY ENACTED IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986, 18 U.S.C. § 2510(4), (5), (12) AND (15), TO PROTECT INTERNATIONAL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT ON AN ELECTRONIC COMMUNICATION SERVICE?

II. DID THE SECOND CIRCUIT ERR IN DISREGARDING THE REQUIREMENTS OF 18 U.S.C. § 2518(9), AND THUS FAILED TO EXCLUDE THE ADMISSION INTO EVIDENCE OF THE ELECTRONIC COMMUNICATIONS IN TRANSIT OR COMPUTER STORAGE, WHICH THE UNITED STATES PROCURED ACCESS TO WITHOUT EITHER JUDICIAL AUTHORITY REQUIRED UNDER 18 U.S.C. § 2516(3), OR ANY WARRANTS ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRED UNDER 28 U.S.C. § 2703(a)?

III. DID THE SECOND CIRCUIT ERR IN NOT EXCLUDING AS EVIDENCE THE ELECTRONIC COMMUNICATIONS THE UNITED STATES PROCURED ACCESS TO THROUGH THE USE OF THE GENERAL IN REM WARRANT, AND GENERAL "RUBBER STAMPED" DEA SUBPOENA, BECAUSE ON THEIR FACE THESE DOCUMENTS VIOLATED THE PROHIBITION AGAINST THE USE OF "GENERAL WARRANT" UNDER THE FOURTH AMENDMENT?

IV. WHETHER THE LOWER COURTS ERRED IN FAILING TO SEPARATE THE CLAIMANTS, AND THEREBY FAILED TO TRACE EACH INTERCEPTED ELECTRONIC COMMUNICATION TO AN ILLEGAL SOURCE OR ACTIVITY?

V. DID THE SECOND CIRCUIT ERR IN FAILING TO COMPLY WITH THE HOLDING IN AUSTIN, WHEN IT FOUND THE ENTIRE INTERCEPTED ELECTRONIC FUND TRANSFER FORFEITABLE ALTHOUGH CLAIMANTS ARE INNOCENT OF ANY CRIME?

VI. DID THE SECOND CIRCUIT ERR IN DENYING DAMAGES UNDER 18 U.S.C. § 2520, ALTHOUGH THE UNITED STATES ADMITTED TO ORDERING THE PROGRAMMING OF "STOP QUES" IN THE COMPUTER MODEM DEVICES OF A COMMUNICATION SERVICE TO THE PUBLIC, TO OBTAIN ACCESS TO ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA WITHOUT THE JUDICIAL AUTHORITY REQUIRED UNDER 18 U.S.C. § 2516(3)?

VII. DID THE SECOND CIRCUIT ERR IN TOTALLY IGNORING THE CLAIMS FOR DAMAGES UNDER 18 U.S.C. § 2707, WHICH WERE BASED ON THE ADMITTED DISCLOSURE TO THE UNITED STATES OF ALL ELECTRONIC COMMUNICATIONS IN COMPUTER STORAGE WHICH HAD GONE TO THE REPUBLIC OF COLOMBIA, ALTHOUGH NO WARRANT WAS SOUGHT OR ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE AS MANDATED UNDER 18 U.S.C. § 2703(a)?

VIII. DID THE SECOND CIRCUIT ERR IN DENYING THE LIMITED PARTNERSHIPS' CLAIMS FOR DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978, 12 U.S.C. § 3403(a), ALTHOUGH THE INTERMEDIARY BANKS ADMITTED TO REPEATEDLY DISCLOSING THE FINANCIAL INFORMATION STORED IN THE LIMITED PARTNERSHIPS "STOP QUE" ACCOUNTS, AND TO RECEIVING COMPENSATION UNDER THE RIGHT TO FINANCIAL PRIVACY ACT?

LIST OF PARTIES

In accordance Rule 12 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of a final decision in United States v. Merrill Lynch Bank, ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993).

The parties that have appeared in this case included those listed on the case caption. As this is a Government initiated civil forfeiture case, the parties below also included Manufacturera del Atlantico Ltda., Manufacturas Internacionales Ltda., Organizacion JD Ltda., Manufacturas JD Ltda., Industrias Marathon Ltda., Comercial Samora Ltda., Abuchaibe Hnos. Ltda., Manufacturas de Moda Ltda; Incolco Ltda; Creaciones

Karen Ltda; Tote Export Manufacturas Ltda; Creaciones Ivonne Ltda.; Confecciones Zuny Ltda., and Valery Fashions Ltda.

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda., have neither parent companies nor subsidiary companies.

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IN THE
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OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioner,

v.

United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda. (hereinafter "Limited Partnerships")[1]

[1]The Limited Partnership are owned by one or two persons, to fabricate and export finished clothing from Barranquilla, Republic of Colombia.

pray that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Second Circuit. In the alternative, an Order should be issued vacating the Second Circuit's decision and ordering reconsideration in light of the provisions of the Electronic Communications Privacy Act and the Right to Financial Privacy Act, as well as this Courts holding in Austin v. United States.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District is reported at 801 F.Supp 984 (1992), and is reproduced at App. 1a.[2] The

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They are is incorporated under the Civil Code of the Republic of Colombia, and have never conducted any commercial activity in the United States.

[2]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

opinion of the United States Court of Appeals for the Second Circuit is not yet reported, and is reproduced at App. 1b. The Order Denying the Petition for Rehearing dated October 6, 1993, is reproduced at App. 1c.

STATEMENT OF JURISDICTION

The Second Circuit issued its opinion on September 10, 1993. It denied a petition for rehearing on October 6, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510:

(4) "intercept" means the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication.

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . .

18 U.S.C. § 2511(1)(a):

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(b) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3):

> Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2518(9):

> The contents of any . . . electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal of State court unless each party, not less than ten days before trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. . . .

18 U.S.C. § 2520:

> (a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally

used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

18 U.S.C. § 2702(a):

Prohibitions.- Except as provided in subsection (b)-(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2703:

REQUIREMENTS OF GOVERNMENT ACCESS.

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**- (1) A government entity may require a

provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

> (A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or
>
> (B) with prior notice from the government entity to the subscriber or customer if the government entity-
>
> (i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
>
> (ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2707:

(a) **Cause of action-** Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

12 U.S.C. § 3401:

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

12 U.S.C. § 3403:

(a) Release of records by financial institutions prohibited

No financial institution, or officer, employee, or agent or a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The United States brought this civil forfeiture in New York pursuant to 18 U.S.C. 981, invoking the rules of

admiralty codified in the Supplemental Rules of Civil Procedure. The Limited Partnerships filed their respective claims under Rule C(6), their respective claims for damages based upon the provisions of 18 U.S.C. § 2520, and § 2707; and 12 U.S.C. § 3416; and, among other things moved to dismiss because the res were various electronic communications and thus not subject to in rem process as a result of the Electronic Communication Privacy Act.

The District Court rejected the Limited Partnerships's jurisdictional objection, denied all of the claims for damages based on the relation back doctrine, and based on a jury verdict found the various electronic communications forfeitable.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. 1291.

B. RELEVANT FACTS

On July 13, 1990, Assistant United States Attorneys for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown (hereinafter Messrs. Hui and Brown), ordered the distribution of copies of a general civil in rem warrant and complaint to all intermediary banks[3] in the greater New York area, including Manufacturers Hanover Trust Company, Banco Atlantico, and The Bank

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[3]All domestic and international electronic fund transfer communication must pass through a sender bank, various intermediary banks, and a beneficiary bank. They all are providing an "electronic communication service" 18 U.S.C. § 2510(15), to the public, as part of the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems. This public service is of great domestic and international importance, as indicated by the fact that daily over 1 trillion dollars are being transferred world-wide via electronic communications.

of New York (hereinafter the "Intermediary Banks").

This general warrant sought only the seizure of a bank account at Merrill Lynch in Columbus Ohio, and did not mention the Limited Partnerships, nor any other electronic fund transfer going to the Republic of Colombia (Lod. 1).

On July 17, 1990, Messrs. Hui and Brown, issued verbal telephone orders to the Intermediary Banks to procure their collaboration as providers of an electronic communication service to the public within the Fedwire, SWIFT, and CHIPS electronic communication systems; so on behalf of the United States the Intermediary Banks would perform general searches of <u>all</u> electronic fund communications going to the Republic of Colombia, regardless of the intended beneficiary.

Based on these verbal instructions the Intermediary Banks admitted to knowingly inserting "stop ques" in their computer communication modem devices so to intercept[4] all electronic funds transfer communications in transit to any third party beneficiary in the Republic of Colombia.

Once the programmed "stop ques" had intercepted the electronic communications, and the messages were placed in computer storage, the Intermediary Banks knowingly failed to comply with the in-

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[4]Although the term "freeze," was used by the Intermediary Banks in their explanation of their handling of the electronic communication (Lod. 8), and by the Second Circuit in their decision (App. 11b); research of the term "freeze," confirms that it has no meaning in the context of electronic communication technology.

Based on the admitted fact that access to the electronic communications in transit was procured through the programming of "stop ques" in the Intermediary Banks computer modem devices, the requirements of the definitions of both "intercept" and "device" in 18 U.S.C. 2510(4) and (5), were satisfied.

struction contained in the electronic fund transfer communication.

On July 19, 1990, based only on the verbal orders of Messrs. Hui and Brown an electronic communication transferring $125,025.00, to Creaciones Viviana Ltda. was intercepted by Banco Atlantico (Lod. 2).

This in transit electronic communication was placed in computer storage at Banco Atlantico, and then after disclosed to Messrs. Hui and Brown.

Subsequently on July 20, 1990, based only on information disclosed by the general in rem warrant of July 13, 1990, a Third Amended In Rem Complaint (Lod. 3), and a general DEA administrative subpoena were issued and served on Banco Atlantico (Lod. 4), and Manufacturers Hanover Trust Company (Lod. 5),

but were not served on the Bank of New York.

The United States admitted that this general rubber stamped DEA subpoena sought the information contained in all the electronic funds transfers previously transmitted to the Republic of Colombia during the prior 180 days, and was issued specifying with instructions that no notice be give to either the Beneficiary Bank or the Limited Partnerships, as required under 18 U.S.C. § 2703(b).

Although Commercial Estrella was named in the Third Amended In Rem Complaint, it was not named in the general DEA administrative subpoena of July 20, 1990 (Lod 4 and Lod. 5).

Neither Creaciones Viviana Ltda., nor Confecciones y Tejidos Nacionales Ltda., were named in either the Third

Amended In Rem Compliant or the general DEA administrative subpoena of July 20, 1990 (Lod. 4 and Lod. 5).

Thus based only on the verbal orders of Messrs. Hui and Brown, and the Third Amended In Rem Complaint on July 24, 1990, the international electronic fund transfer belonging to the Comercial Estrella for $301,500.00, was intercepted at Banco Atlantico. The electronic communication was then placed in computer storage, and then disclosed to the United States (Lod. 6).

Based on the information divulged and disclosed by the Intermediary Banks a Sixth Amended In Rem Complaint, naming all three Limited Partnerships, was filed and served on July 24, 1990, on only the Bank of New York (Lod. 7), but

not on Banco Atlantico or Manufacturers Hanover Trust Company.

Therefore again based on the verbal orders of Messrs. Hui and Brown, on July 26, 1990, an international electronic fund transfers to Confecciones y Tejidos Nacionales Ltda., for $549,910.00, was intercepted by Manufacturers Hanover Trust Company (Lod. 9). The information was then placed in an account in computer storage, and disclosed to the United States (Lod. 8).

On July 31, 1990, a week after the electronic communication intercepted the Sixth Amended In Rem Complaint was served on Banco Atlantico and Manufacturers Hanover Trust Company (Lod. 10 and 11).

On August 6, 1990, two international electronic fund transfer belonging to

the Creaciones Viviana for $50,000.00 (Lod. 12), and $50,033.00 (Lod. 13), were intercepted by The Bank of New York. These electronic communication were then placed in computer storage, and disclosed to the United States.

The Intermediary Banks have admitted that after the "freezing" of each electronic funds transfer communications belonging to the Limited Partnerships, the transmission were placed in computer storage in "stop que" accounts under the name of each beneficiary. The Intermediary Banks have admitted holding the funds in these accounts until the funds were sent to the Clerk of the Court for the Eastern District of New York in late August, 1990 (Lod. 8).

The Limited Partnerships filed both verified claim for their funds, and

claims against the United States for the unauthorized interception of their electronic communications, and for the disclosure of their electronic communication information.

In June, 1991, under the authority of the Right to Financial Privacy Act of 1978, the Intermediary Banks applied for and were compensated for all of their costs relating to their collaboration with the United States (Lod. 16).

From November, 1990, through March, 1992, during attempted discovery of the United States and the Intermediary Banks, Judge Weinstein first granted to the United States an ex parte stay from all discovery for over eight months; and then when the stay was lifted, denied

discovery of both the United States, and the Intermediary Banks.[5]

On March 3, 1992, one day before the start of the two month jury trial, Judge Weinstein dismissed the claims against the United States.[6]

Judge Weinstein refused repeatedly all request by the Limited Partnerships pursuant to 18 U.S.C. § 2518(9), that

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[5]Since all discovery was denied, the exact number of electronic communications intercepted in transit to the Republic of Colombia is not known. However, it is known that contrary to the regulations of the Federal Reserve, and the agreement entered into to be a part of the FEDWIRE, SWIFT and CHIPS electronic communication systems, the Intermediary Banks neither notified the sender, the Federal Reserve, the beneficiary bank, nor any third party beneficiaries in the Republic of Colombia, that they would not comply with the instructions contained in the intercepted electronic communications.

[6]All the claims for damages for violation under the Electronic Communications Privacy Act were dismissed based on the relation-back doctrine. The claim for damages under Right to Financial Privacy Act, was dismissed because the Court found, although permitting no discovery on the issue, that no "account" was held in the name of the Limited Partnership, although being the intended beneficiary.

the United States produce the judicial authorization for the interception of their electronic communications.

Finally, based on the relation back doctrine, Judge Weinstein denied the Limited Partnerships motions pursuant to 28 U.S.C. § 2518(9), to exclude as evidence all intercepted and disclosed electronic communication obtained by the United States without judicial authorization.

The Second Circuit held that 18 U.S.C. § 2510 et seq., did not apply because of its use of the 1968 definition of the term "intercept."

The Second Circuit failed to consider in any manner the violations of the prohibitions against "disclosure" under 18 U.S.C. §§ 2511(1)(c) and (3)-(a); 2702(a), and 2703(a).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT ERRED BY INTENTIONALLY FAILING TO CONSIDER THE ADMITTED UNAUTHORIZED "DISCLOSURE" OF ELECTRONIC COMMUNICATIONS IN TRANSIT AND COMPUTER STORAGE, AND IN USING THE OLD 1968 DEFINITION OF "INTERCEPT" AND "DEVICE," SO TO HOLD THAT THE PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES DID NOT CONSTITUTE "INTERCEPT," AND THUS THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986 DID NOT APPLY.

Prior to 1986, Congress and others were concerned that modern communication modes, and their future development, such as electronic fund transfers and other computer messaging, might be constitutionally less confidential than older methods.[7]

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[7]Senator Pat Leahy wrote to the then Attorney General on his concern for the protection of information in electronic communication. See Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986, p. 3557 (hereinafter "Senate Report"). See also Electronic Communication Privacy Act of 1986, House Report No. 99-647, June 19, 1986, Committee on the Judiciary, 99th Congress (hereinafter "House Report").

At the time there were three possible Fourth Amendment arguments advanced to justify warrantless searches of computer messages, or records thereof, under the control of a third-party computer service provider:

1. The user disclosed their messages to the third party, as the customer in United States v. Miller, 425 U.S. 435 (1976), who disclosed his financial information to the bank, and thereby assumed the risk that the third party would disclose them to the government.

2. The third party's ability to access the user's messages deprived the user of any legitimate expectation of privacy, as happened in Smith v. Maryland, 442 U.S. 735 (1979).

3. The third party has power to consent to a search because it has "con-

current authority" over the records, as happened in United States v. Matlock, 415 U.S. 164 (1974).

In response to this, Congress amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., to specifically clarify the existence of and limits to the confidentiality rights of electronic messages by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq.[8]

These precise amendments were enacted to prevent the interception "or

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[8]The Senate Report, p. 3555, states, "[t]he Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968-the Federal wiretap law-to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of dramatic changes in new computer and telecommunications technologies."

other acquisition,"[9] of the contents of electronic funds transfer communications,[10] and to clarify the existence of and limits to the confidentiality rights of these electronic messages in transit and computer storage, vis-a-vis the Government and an electronic communication service provider.[11]

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[9]Prior to the 1986, the term "intercept" was limited to "aural acquisition," but with the enactment of amended 18 U.S.C. § 2510(4), Congress obtained a "fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." House Report at p. 19.

[10]An "electronic funds transfer communications" is the transmittal of financial information between banks via computer or other electronic messages. Because Fedwire, CHIPS, and SWIFT systems are communication service providers, electronic funds transfers in transit and storage on these systems are protected communications under 18 U.S.C. § 2516(3), and § 2703(a). See also House Report at p. 23.

[11]"The purpose of the legislation is to . . . to prohibit the interception of certain electronic communications; to provide procedures for the interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease

The amendments accomplish the following:[12]

i. they expand the definition of the term "intercept" to include the obtaining access of electronic communication. 18 U.S.C. § 2510(4).

ii. they expand the definition of the term "device" to include any device or apparatus that could intercept

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certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report, at p.16.

"In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes potential consequences of its snooping far more ominous than those of . . .private individual or firm."Id. at p. 19.

[12]In short the Electronic Communications Privacy Act, mooted arguments (1) and (2) above (insofar as they pertain to private messages in transit and short term records thereof) but left number (3) largely intact, if certain requirements were met. See Chapter 19, Confidentiality and Control of Data, at p. 361 to p. 386, of Benjamin Wright, The Law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability, November, 1991, Little, Brown and Company; See also Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987).

an electronic communication. 18 U.S. C. § 2510(5).

iii. they prohibit the intentional and unauthorized interception of an electronic communication in transmission, and the knowing disclosure or use of a communication so intercepted. 18 U.S.C. § 2511(1)(a) and (c);

iv. they prohibit a communications service provider from intentionally and illegitimately disclosing an electronic communication in transmission. 18 U.S.C. § 2511(3)(a);[13]

v. they prohibit access by both the federal and state governments to stored electronic messages and

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[13]Under the Federal Communications Act of 1934, 47 U.S.C. § 605 (1988), the ability of a communication service provider from divulging messages is also prohibited.

service providers transactional records. 18 U.S.C. §§ 2703(a); and

vi. they prohibit the unauthorized access to stored electronic communications. 18 U.S.C. § 2702(a).

Turning to United States v. Merrill Lynch Bank, 801 F.Supp 984 (1992), ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993) (hereinafter "All Funds Case"), based on the Second Circuit applying the limited old 1968 definition of "intercept" and "device," and intentionally not using the expanded 1986 amended definition in 18 U.S.C. § 2510-(4) and (5), it approved of the use of verbal orders issued by low level Department of Justice employees,[14] to pro-

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[14]In 1986, the Department of Justice, wrote to Congress to confirm that it agreed that for three years following enactment, it would require that the same senior level of authority as in 18 U.S.C. § 2516(1) (i.e. Deputy Assistant Attorney

cure the interception and disclosure of the Limited Partnerships's in transit electronic communication, and held that the Electronic Communication Privacy Act did not apply, and thus denied the Limited Partnerships all of the protection under the Act, and their claim for damages (App. 68b).

Thus in this manner the Second Circuit held that interception did not occur despite the admitted programming of "stop ques" in the Intermediary Banks' computer modem devices.[15]

General of Criminal Division or higher), be required to seek judicial authority to access electronic communication in transit under 18 U.S.C. § 2516(3). Furthermore, the Department of Justice promised to provide 90 days notice to Congress of any change in this regulation. Senate Report at p. 3682 ; House Report at p. 51.

[15]A `modem,' (modulator/demodulator), has been defined as ". . . a device used to permit communications between computers at different sites, or between a computer and remote terminal, by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C.

More interestingly, as well as far more troubling, was the Second Circuit's total ignoring of not only the specific Congressional prohibitions against "disclosure" of electronic communications in transit contained in 18 U.S.C. § 2511-(1)(a), (c) and 3(a); but also its total ignoring of the complete prohibition contained in 18 U.S.C. § 2703(a), against "disclosure" of electronic communication in computer storage for less than 180 day unless a warrant was issued under the Federal Rules of Criminal Procedures.

By ignoring these the Second Circuit condoned the use verbal order issued by employees of the United States,

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Del, 551 F.Supp. 163, 169." Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp. Thus under 18 U.S.C. § 2510(5), a device was used by the Intermediary Banks at the request of the United States.

and general in rem warrants, to acquire access to the Limited Partnerships's electronic communication stored in the Intermediary Banks's computer storage for less than 180 days, in violation of 18 U.S.C. § 2516(3), and § 2703(a)[16].

Therefor the Second Circuit decision is completely in error and must be reversed because:

First, by focusing on the old limited 1968 definition of the term "intercepts," and "device," the Second Circuit intentionally disregarded the new expanded 1986 definition which Congress specifically enacted to restrict the procuring of the interception of electronic communication in this new age of

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[16]Under 18 U.S.C. § 2703(a), access to the Limited Partnerships' electronic funds transfer communications could only be obtained through a judicial warrant issued under the Federal Rules of Criminal Procedure.

computer technology. 18 U.S.C. § 2510(4) and (5);

Second, the Second Circuit totally ignored the admitted facts that based only on verbal order, and without any judicial authority as required by 18 U.S.C. § 2516(3) and the regulations of the Department of Justice, or a warrant issued under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2703(a), "stop ques' were programmed by Intermediary Banks in their computer modem devices to monitor and acquire access to all electronic fund transfer communications going to the Republic of Colombia.

Third, Second Circuit totally ignored the prohibition in 18 U.S.C. § 2511(1)(a), against one who "procures any other person to intercept" an electronic communication;

Fourth, the Second Circuit totally ignored the prohibition against a person or entity who "intentionally discloses, to any person the contents of any electronic communication" in 18 U.S.C. § 2511(1)(c);

Fifth, the Second Circuit totally ignored the statutory prohibition against "a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication" in 18 U.S.C. § 2511 (3)(a); and,

Sixth, totally ignored the statutory prohibition against an "entity providing an electronic communication service to the public [who] knowingly divulge to any person or entity the contents of a communication while in elec-

tronic storage by that service," 18 U.S.C. § 2702(a).

II. JUDGE WEINSTEIN AND THE SECOND CIRCUIT ERRED IN ADMITTING INTO EVIDENCE THE UNAUTHORIZED INTERCEPTED AND DISCLOSED ELECTRONIC FUND TRANSFER ADVICE WITHOUT COMPLYING WITH 18 U.S.C. § 2518(9).

Despite repeated motions to seek from the United States the judicial authority it had for the interception and disclosure of the Limited Partnerships's electronic communication, Judge Weinstein refused to comply with the mandates in 18 U.S.C. § 2518(9).

Thus since His Honor failed to comply with the 18 U.S.C. § 2518(9), the Second Circuit was required to hold that all the electronic communications obtained without judicial authority under 18 U.S.C. § 2516(3) and 18 U.S.C. § 2703(a), were inadmissable as evidence. However the Second Circuit completely

ignored this statutory mandate (App. 57b).

Because this statutes were not complied with, the finding that the Limited Partnerships's electronic communication were forfeitable must be reversed.

III. THE IN REM WARRANT OF JULY 13, 1990, WAS A PROHIBITED GENERAL WARRANT WHICH VIOLATED THE FOURTH AMENDMENT, THUS THE INTERCEPTED AND DISCLOSED ELECTRONIC COMMUNICATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied., 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 72, 107 S.Ct. 1013

(1987), the Court held that, "[t]he manifest purpose of this particular requirement was to prevent general searches." Id. at 480 U.S. 84.

In this case on July 13, 1990, so to permit Messrs. Hui and Brown to rummage through every third party electronic funds transfer going to the Republic of Colombia, an overbroad general in rem warrant was issued to the Intermediary Banks, with verbal order to stop by the use of "stop ques" these electronic communications.

Thus the general in rem warrant of July 13, 1993, was in clear violation of the Fourth Amendment, and evidence obtained should have been excluded.

In Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), this Court held that the New York State

wiretapping statute was overbroad and therefore violated the Fourth Amendment because:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations . . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statutes's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures. Id. at 388 U.S. 58-60

Each of these abuses were employed to stop the electronic communication of the Limited Partnerships:

a. the communications stopped by the programming of "stop ques," were not described at all in the July 13, 1990 general in rem warrant;

b. the search of Intermediary Banks computer storage of electronic funds transfers covered the period of over 180 days, from January, 1990 through September, 1990; and,

c. Messrs. Hui and Brown had "full discretion" as to which electronic fund transfer to permit the Intermediary Banks to transmit and which to hold in computer storage.

This use of the July 13, 1990, in rem warrant cannot be permitted, and in addition to excluding any evidence obtained by the general warrant, damages, including cost and attorney fees should be awarded.

IV. THE SECOND CIRCUIT DISCRIMINATED AGAINST THE LIMITED PARTNERSHIPS BY COMBINING THEIR APPEAL WITH ALL OF THE OTHER CLAIMANTS, AND BY FAILING TO TRACE EACH SPECIFIC INTERCEPTED ELECTRONIC COMMUNICATION TO ANY ILLEGAL DRUG TRANSACTION OR DRUG MONEY LAUNDERING TRANSACTION.

The Supreme Court has held, that "[conspiracy] proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750 at 733, 66 S.Ct. 1239 (1966). Where evidence as to some conspirators spills over against another, all cannot be tried together. United States v. Camiel, 689 F.2d 31, 39 (3rd Cir. 1982). See United States v. Bertolotti, 529 F.2d 149, 156 (2d Cir. 1975).

Despite this Judge Weinstein refused repeated motions for separate trails by the different groups of claim-

ants; and the Second Circuit automatically combined the different group of claimants although their Notice of Appeals were filed separately.

However, it is apparent from the numerous errors of facts in both Judge Weinstein's and the Second Circuit's decisions that the Limited Partnerships have been prejudiced by evidence presented by and against claimants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashion Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. (the "Barranquilla Claimants"),[17] and the sheer force of

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[17]The Second Circuit discriminated against the Limited Partnerships by ascribing the following testimony presented in the defense of only the Barranquilla Claimants:

"The claimants tried to show that the monies were the legitimate profits from the sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing

numbers of the intercepted electronic communication apparently rendered the task of separation impossible for the lower courts, and spill over inevitable occurred.

Furthermore, the Second Circuit erroneously states that the United States established probable cause and presented evidence at trial that the source of each specific intercepted electronic fund transfer belonging to the Limited Partnerships was connected to the illegal drug transactions and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz Londono.

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were handed over to ship captains who toured the Caribbean island, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipment through charitable means." App. p. 18b.

The United States never presented any evidence what s ever to show that the specific intercepted electronic fund transfer came from any traceable illegal source.

The facts demonstrated at trial, through three tracing analysis charts, was that each individual electronic fund transfer intercepted, and later seized, were neither the traceable proceeds of illegal drug activity, nor were they traceable to any drug money laundering transactions, but came from specific sources that the United States investigated for over two years, and still failed to present any culpable evidence.

In today's climate of public attitude in the United State against Colombian citizens, and Colombia, the federal courts must be required to take extra

precautions against discriminatory over spilling of evidence presented in any large civil conspiracy case.

Thus for the reason that the United States failed to meet its burden of tracing, and because of the numerous errors of fact in its decision, the Second Circuit must be reversed.

V. THE FORFEITING OF ELECTRONIC FUNDS TRANSFER BECAUSE THEY WERE DERIVED FROM THE WORLD WIDE PARALLEL CURRENCY MARKET IS A PENALTY THAT IS BOTH DISPROPORTIONATE AND EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT AND AUSTIN.

The Second Circuit decision in the All Funds Case, directly conflicts with the decisions of this Court in Austin v. United States, 509 U.S. , decided June 28, 1993, 61 LW 4811 (June 29, 1993) (hereinafter "Austin"). See also Alexander v. United States, 509 U.S. , de-

cided June 28, 1993, 61 LW 4796 (June 29, 1993).

In the instant action the United States is implement its new policy regarding the "war on illegal drugs" by seeking to punish the Limited Partnerships, although innocent of any crime, because the electronic funds transfers intercepted, and seized came from the world wide parallel currency market, which the United States contend contains an unknown percentage of proceeds from illegal drug traffic.

Based on Austin, this is in violation of the Eighth Amendment.

In Austin, a North Dakota man had lost his car-repair business and his mobile trailer after selling two grams of cocaine to an undercover agent. The Government had disputed the contention

of the defendant, Richard Lyle Austin, that the seizure under a civil forfeiture law had violated the "excessive fines" clause.

The Government maintained that Federal laws that gave it the authority to take Mr. Austin's home and business were remedial because they were intended to permit the removal of tools of the drug trade. It also said the seizure was a proper way of repaying the Government for the expenses of law enforcement.

The Court's unanimous opinion in Austin, found that the Eighth Amendment applied to both civil and criminal proceedings and that the forfeiture laws had been intended at least to punish the property owner, and as such fell under the Eighth Amendment.

"The purpose of the Eighth Amendment, . . . , was to limit the government's power to punish. . . . The Excessive Fines Clause limits the government's power to extract payment, whether in cash or in kind, `as punishment' for some offense. . . . (citation omitted) `The notion of punishment, as we commonly understand it, cuts across the division between civil and the criminal law.' United States v. Halper, 490 U.S. 435, 477-448.. . . `It is commonly understood that civil proceedings may advance punitive and remedial goals, and conversely, that both punitive and remedial goals may be served by criminal penalties." Austin at 4813.

"In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We however, must determine that it can only be explained as serving in part to punish. We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to under stand the term." (emphasis added) Austin 4813.

"Our cases also have recognized that statutory in rem forfeiture imposes punishment." Austin at 4814.

As a noted above as the new policy in its war on illegal drugs the United States has determined to focus on the funds allegedly relating to narcotics trafficking. To this end the United States has determined to investigate all funds going to the Republic of Colombia, from whatever source, and punish those who use the parallel currency market.

However, in the instant action to forfeit the electronic fund transfer of the Limited Partnerships based on the fiction that the electronic funds transfer was guilty of some wrong since they came from the world wide parallel market, is disproportionate and an excessive fine in violation of the Eighth Amendment and the holding in Austin.[18]

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[18]It is also a violation of the Fifth Amendment due process clause to forfeit the property of the Limited Partnerships as truly

VI. THE SECOND CIRCUIT ERRED IN DENYING DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES TO "INTERCEPT," AND FOR THE UNAUTHORIZED DISCLOSURE OF ELECTRONIC COMMUNICATION IN COMPUTER STORAGE.

The Second Circuit is in direct conflict with mandates of Congress regarding the protection of "electronic communications" in transit and in computer storage, by refusing to grant an award of damages based on the admitted facts.

In support of their motion to dismiss under Rule 12(b)(6), the United State admitted that between July 16, 1990, and August 8, 1990, Messrs. Hui and Brown, without any judicial authori-

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innocent owners. See Austin p. 4815, footnote 10. It is important to note for the Court that the United States obtained an eight month stay on discovery based on its ex parte presentation that criminal indictments were involved. The Limited Partnerships have neither been accused of any crime nor indicted.

ty required under 18 U.S.C. § 2516(3) and § 2703(a), did instruct Intermediary Banks to:

(i) program "stop ques" in their computer modem devices, and not to comply with any accepted wire transfer instructions contained in any wire transfer going to the Republic of Colombia;

(ii) permit repeated unauthorized disclosure of accepted wire transfer instructions in transit to the Republic of Colombia, and in computer storage; and,

(iii) place into a "stop que" account at their respective banks the information related to intercepted wire transfer communications.

Despite these admissions of programming of "stop ques," and the repeated "disclosure" of electronic communica-

tion information by Intermediary Banks,[19] the Second Circuit denied the claims for damages.

However from the admitted facts liability of the United States exists because they did exactly what was specifically prohibited.

Consequently, because of the importance of the issues involved given the admissions of the United States, the Court is requested to exercise its power of supervision and reverse the Second Circuit.

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[19]The Senate Report at p. 3580. stated that, ". . . the Electronic Communications Privacy Act amends existing section 2520 of title 18 of the United States Code to incorporate violations involving . . . , **disclosure** . . . of . . . electronic communications.

VII. THE SECOND CIRCUIT ERRED IN DENYING DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.

The Intermediary Banks have admitted that they had placed the funds relating to each intercepted electronic funds transfer in an account in the name of each Limited Partnerships.

Also the Intermediary Banks admit to being compensated by the United States under the provisions of the Right to Financial Privacy Act, for the expenses they incurred in their collaboration.

Despite these admitted facts, and the fact that discovery was barred by the District Court, the Second Circuit held in the All Funds Case, that 12 U.S.C. § 3403(a), is not applicable because the Limited Partnerships is not a "customer" of Intermediary Banks.

The Limited Partnerships argues that liability does exist under the Right to Financial Privacy Act not only because the Intermediary Banks have admitted that they placed the intercepted electronic fund transfers in a "stop que" account in their computer storage;[20] but also because the Intermediary Banks were compensated for the expenses relating to their collaboration under the Right to Financial Privacy Act.

Because of the above admissions this Court should grant this Petition

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[20]The accounts had to be setup in accordance with the regulations of the Fedwire, SWIFT, and CHIPS systems. Said regulations requires that each electronic funds transfer which is delayed be maintained in a separate and distinct account apart from all others transfers. Also the spurious inference in the Second Circuit's opinion that the Limited Partnerships are not "partnerships" for purposes of the act disregards the Republic of Colombia Civil Code, and Section 101(7) of the Uniform Limited Partnership Act.

for Writ of Certiorari so to reverse the Second Circuit.

CONCLUSION

Through the admitted use of only a self executing general in rem warrant, and verbal telephone orders, the United States did knowingly procure the collaboration of the Intermediary Banks, in their programming of "stop ques" in their communication computer modem devices, so to acquire access for the United State of the information in the in transit electronic funds transfer communications of the Limited Partnerships, and disclose the Limited Partnerships's electronic communication information in computer storage.

Because these activities violated the protection given by Congress to "electronic communications" and "finan-

cial information," the Second Circuit's holding that the electronic communications were forfeitable, and its denying the claim for damages, must be reversed.

The Second Circuit's decision has not only serious factual errors, but more disturbingly it is drafted to disregard totally the following precise statutory language Congress enacted in 1986, to protect electronic communications from unauthorized interception and disclosure:

- 18 U.S.C. § 2510(4) and (5);
- 18 U.S.C. § 2516(3);
- 18 U.S.C. § 2511(1)(a) and (c);
- 18 U.S.C. § 2511(3)(a);
- 18 U.S.C. § 2703(a); and,
- 12 U.S.C. § 3403(a).

This willingness of the Second Circuit to look the other way when there is

admitted violation of federal statutes, just because only citizens and partnerships from the Republic of Colombia are involved, brings to mind the following colloquy that has been attributed to the great Chancellor, Sir Thomas More:

Roper: So! Now you give the Devil benefit of law!

More: Yes. What would you do, cut a great road through the law to get after the Devil?

Roper: Yes! I'd cut down every law in England to do that!

More: Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

* * *

Yes, I give the Devil benefit of law for my own safety's sake.

Robert Bolt, "A Man for All Season."

Whether or not the words be the historical More's or only the playwright's, the insight is both profound, and serves as the key foundation for requesting this Court to issue a writ of certiorari to the Second Circuit.

This Court must reverse the lower courts so to rein in their misguided enthusiasm to permit the use of the forfeiture laws to hack that great road through precise legislation recently enacted by Congress to protect electronic communications from the unauthorized access and disclosure which occurred here.

Furthermore, this Court should issue a writ of certiorari so to provide supervisory guidance to the federal courts in the enforcement of the Elec-

tronic Communication Privacy Act and the Right to Financial Privacy Act.

Respectfully submitted,

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(2)

No. 93-1002 DEC 20 1993

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA., COMERCIAL ESTRELLA LTDA., and CONFECCIONES Y TEJIDOS NACIONALES LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Reported at: 801 F. Supp 984
(E.D.N.Y. 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE,FENNER & SMITH, ET AL., Defendants.	MEMORANDUM AND ORDER CV-902510

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WEINSTEIN, J.:

This case reveals the sophisticated financial operations of an international criminal syndicate. It involves more than ten million dollars in wire transfers and deposited funds seized by the government

as the traceable proceeds of illegal money-laundering and narcotics transactions. The moneys were alleged by the government to be subject to forfeiture under 21 U.S.C §881 et seq (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Claimants had the burden at trial of proving either that each amount was not traceable to drug sales or that the claimants were unaware of the taint. After a two-month trial, the jury found that eighteen of the twenty-two amounts seized were forfeitable. For three amounts claimed by two claimants the jury determined that the funds were not the traceable proceeds of illegal money-laundering and narcotics transactions, and for one amount the jury found that the claimant was an innocent owner.

Claimants who received an adverse jury decision move for judgment notwithstanding the verdict or for a new trial; those motions are denied. Their motions to stay execution of the judgment during the appeal without posting a supersedeas bond are granted. Claimants supported by the jury verdict move to release the res; that motion is granted. The government moves to stay payment of proceeds to two claimants on the ground that they are represented by a fugitive; that motion -- perhaps the most interesting in the case -- is denied.

I. FACTS

Most of the funds seized and forfeited are the proceeds of a well-organized multinational organization based in the city of Cali, Colombia and led by a fugitive named Jose Santa Cruz

Londono. Londono and others conducted extensive narcotics trafficking and money-laundering activities involving hundreds of millions of dollars and thousands of kilograms of cocaine smuggled into the United States.

The Londono organization utilized many sophisticated strategies to launder narcotics proceeds. Electronic funds transfers from companies nominally in the clothing manufacturing or import-export business moved currency internationally; cars filled with cocaine were driven from Florida to New York, where the drugs were exchanged for cash and driven back to Florida (with the money at times smelling so strongly of drugs and drug-processing ingredients that it had to be literally washed

before it could be counted); shell

corporations in Panama and Colombia electronically transferred money to Europe and elsewhere; huge amounts of cash were flown by plane to Panama, unloaded, and deposited in banks accustomed to such practices; drug dollars were exchanged on the black market in Colombia for Colombian pesos; shipments of manufactured goods from Colombia to Panama were "lost" to cover up dollar transfers; "loans" were made and paid the same day; and many other procedures were used to disguise the true source and nature of the funds.

Extensive corporate and banking records from all over the world were the primary basis for the government's case. Claimants used corporate records, letters rogatory, testimony of those with knowledge of claimants' activities, and

still and video pictures purporting to show the operations of their manufacturing plants in Colombia.

The Chief of the Drug Enforcement Administration Financial Intelligence Group, Cheryl Holmes, testified at trial after reviewing the voluminous bank and corporate records seized. She traced the links between numerous Panamanian shell corporations, which sent and received electronic funds transfers, and the Londono enterprise. Certified Public Accountant Aram Kostoglian, another government witness, testified that the cash receipts, corporate records, and bank statements of the claimant corporations were inconsistent with the types of records held by legitimate companies in Colombia and elsewhere. Several former Londono associates who had

pled guilty also testified at trial to the illegal nature of the various enterprises utilized by claimants; one, who dealt in gold as a cover-up, described the counting and re-packaging of huge stacks of United States currency.

In connection with the money-laundering scheme, substantial sums of money were electronically transferred into and out of bank accounts in many countries including the United States. See generally Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992) (describing the wire transfers). Officials of several European countries began cooperating in 1989 investigating the suspected drug-money-laundering activities of Jose Santa Cruz Londono.

The inquiry began in Luxembourg and culminated in the seizure of funds in New York and abroad during the summer of 1990.

In September 1989, using a wiretap the Luxembourg Surété Publique intercepted a telephone call between Londono in Colombia and Jose Franklin Jurado-Rodriguez, a Londono associate, in Luxembourg. Jurado reported to Londono that he had successfully opened bank accounts using the name of Londono's father-in-law, and that he planned to set up several shell companies to assist in the money-laundering enterprises. The Surété learned through wiretaps and faxtaps that another Londono associate, Edgar Alberto Garcia-Montilla, was opening bank accounts throughout Europe in the names of Londono's parents-in-law,

Heriberto Castro-Mesa and Esperanza Rodriguez de Castro.

In June 1990, Jurado, Garcia, and a third associate Ricardo Mahecha-Bustos, were observed by European law enforcement officers during a ten-day period traveling and depositing large sums of money in accounts in Italy, Luxembourg, Belgium, Denmark, Sweden, Germany, and the Netherlands. They were arrested when they returned to Luxembourg on money-laundering charges after a lengthy trial.

Heavy wire transfer activity followed the three arrests. Using memoranda and bank records seized at the time of the arrests, officials from several countries were able to identify bank accounts around the world connected to the complex drug money-laundering scheme. In July and August 1990

approximately thirty million dollars was seized in Europe and sixteen million dollars was seized in Panama. In the United States, several American banks having correspondent banking relationships with Panamanian and Colombian banks were instructed by the United States Attorney to seize certain funds on deposit and wire transfers. The seized funds, totaling over ten million dollars, were the subject of this All Funds action.

Pursuant to a succession of amended complaints and supplemental warrants the banks were ordered by the United States Attorney to attach the identified accounts and wire transfers and pay the money into court pending the outcome of a plenary trial. In a separate action by claimants against the banks which seized

the funds, summary judgment was granted for the defendant banks. See Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). Another related action, by claimants against the United States Attorneys who ordered the banks to seize the funds, was dismissed for failure to state a claim. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

Testimony at trial revealed an officially sanctioned parallel unofficial street market in dollars in Colombia. There was testimony that it is common knowledge in the streets and board rooms of Colombia that the source of the millions of American dollars in circulation in this "black" market is

largely the drug trade in New York and other American cities.

II. LAW

As the "drug was" has escalated, the number of forfeiture cases in the United States has burgeoned. Taking away the profits of drug crimes through forfeiture is a powerful weapon to cripple drug-trading enterprises. Unfairly wielded it can place commercial enterprises at a terrible disadvantage. It skirts the edge of due process. See, e.g., United States v. $8,850 in United States Currency, 461 U.S. 555, 565-66 (1983) (balancing test set out in speedy trial context in Barker v. Wingo, 407 U.S. 514, 530 (1972), applies to determine reasonableness of delay in forfeiture proceedings). Even when a claimant is

successful in fending off ultimate forfeiture, the loss of use of the seized funds for months or years while the case drags on can cripple a business. See id. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). The substantive law, procedures, and allocation of burdens of proof in forfeiture cases differ markedly from other civil proceedings, and give the United States prosecutor a substantial edge. See generally Edward M. Genson & Mark W. Martin, A Guide to Handling Federal Narcotics Forfeiture Cases, 79 Ill. B.J. 180 (1991) (discussing forfeiture procedures).

The government brought these proceedings under 21 U.S.C. § 881(a)(6), which provides for the forfeiture of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such and exchange . . .

The procedures applied in civil forfeiture proceedings are those "law[s] relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

Burdens of proof are allocated by 19 U.S.C. § 1615. Under that section, the burden of proof is on the claimant, "[p]rovided that probable cause shall be first shown for the institution of such suit or action, to be judged . . . by the

court." To begin forfeiture proceedings the government must first demonstrate that there was probable cause to institute the action. It must demonstrate that there are "reasonable grounds" to believe that the property is subject to forfeiture. United States v. Banco Cafetero Panama, 197 F.2d 1154, 1160 (2d Cir. 1986). "These grounds must rise above the level of mere suspicion but need not amount to . . . 'prima facie proof.'" Id.

The reasonable ground standard is less stringent than the preponderance of the evidence standard. United States v. 303 W 116th Street, N.Y., N.Y., 901 F.2d 288, 291 (2d Cir 1990). The government need not link the funds to a particular narcotics transaction, but rather must "connect the property with narcotics

activity . . . ." Banco Cafetero, 797 F.2d at 1160. In satisfying its burden, the government may demonstrate probable cause that the property itself, apart from the actions of the owner, is connected to narcotics activity. See id.; see also United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (innocence of owner does not by itself prevent forfeiture). This reflects the legal fiction that the object itself is the wrongdoer. Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 9212 (E.D.N.Y. 1992); United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S>D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd

762 F.2d 991 (2d Cir. 1985).

Probable cause is "judged . . . by the court." 19 U.S.C. § 1615; United States v. Sixteen Cases of Silk Ribbons, 27 F. Cas. 1099 (D.C.N.Y. 1870) (question of whether probable cause shown so as to shift burden to claimants is a question for the court); Three Thousand One Hundred and Nine Cases of Champagne, 23 F. Cas. 1168 (D.C.N.Y. 1867) (same). Hearsay is admissible to support the finding of probable cause. United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989) (hearsay proper, since holding otherwise would undermine Congress's intentional shifting of the burdens in forfeiture cases). As the Second Circuit has explained:

> In view of the unusual relative burdens of proof in civil forfeiture

> proceedings, this court, as well as a number of other circuits, has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits.

United States v. 15 Black Ledge Drive, Marlborough, Ct., 897 F.2d 97, 101 (2d Cir. 1990). Circumstantial evidence may be relied upon to show probable cause. United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984). In the instant case, first a magistrate judge and then a district judge de novo determined that the government had probable cause to believe the funds were forfeitable. The district court's hearing on probable cause required three trial days in 1991. Post-hearing motions

to reconsider the probable cause issue were denied. See United States v. All Funds et al., __ F. Supp. __, 1992 WL 37087 (E.D.N.Y. 1992).

Once the government has demonstrated probable cause, "the burden of proof shall lie upon" the claimant. 19 U.S.C. § 1615. Standing is "a threshold issue" for a claimant wishing to contest forfeiture. United States v. One 1982 Porsche 928, Three-Door, License Plate 1986/NJ Temp/534807, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). If the claimant does not have standing, "the court lacks jurisdiction to consider his challenge of the forfeiture." Id. A claimant need not have actual or constructive ownership to have standing; even a possessory interest in the property is sufficient. United States v. $37,590.00, 736 F. Supp.

1272, 1276 (S.D.N.Y. 1990).

If a claimant has standing, it bears the burden of proving by a preponderance of the evidence either 1) that the funds did not have their source in illegal drug transactions and money-laundering, or 2) that it did not know or constructively know -- through conscious avoidance of positive knowledge -- the source and nature of the funds as drug-related (the innocent owner defense). United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989).

The innocent owner defense is set out in the statute:

> [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without [his] knowledge . . . .

21 U.S.C. § 881(a)(7). "Owner" is

defined as "any person with a recognizable legal or equitable interest in the property seized." United States v. One Parcel of Real Property, 831 F.2d 566, 567 (5th Cir. 1987) (citing legislative history). Ascertaining knowledge of corporate claimants requires examining the contents of corporate books and records and the actions taken by persons acting as corporate agents.

To satisfy its burden of proof the claimant may not simply attack the finding of probable cause. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). It has the "ultimate burden of proving that the factual predicates for

forfeiture have not been met." Banco Cafetero, 797 F.2d at 1160. If the claimant cannot establish that the funds are untainted or that it is an innocent owner, the property is forfeited.

The structure of this kind of case is inherently unfair to claimants which must prove that their money is legitimate after the funds have already been seized by the government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced.

Foreign enterprises conducting business in a foreign language utilizing business practices different from those known to American jurors are at a particular disadvantage. Moreover, it is

often difficult to prove a negative, as claimants must. (Yet, the jury was able to precisely differentiate those cases warranting forfeiture from those in which money was not subject to forfeiture. The diligence and determination of this American jury to be fair to foreign claimants is striking.)

A claimant that surmounts all hurdles and wins a jury verdict is entitled to receive its money promptly. In the instant case the hearing on whether the government had probable cause to seize the funds were not completed until nine months after the funds were seized. The trial was completed more than a year later. Few businesses can function without access to a substantial portion of their assets for that period of time. The claimants who met their

burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds. They will have been without the use of their money for the two years since the funds were seized.

III. APPLICATION OF LAW TO FACTS

A. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Rule 50(b) of the Federal Rules of Civil Procedure a judge may disregard the jury's verdict only

> if the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor.

Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Lous

Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The court should disregard a jury determination for which "there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." 1991 Adv. Committee Notes to Rule 50(b).

In the course of the two-month trial in the instant case, the jury conscientiously listened to the evidence, took notes, and was extremely careful in the course of its decision-making. The jurors were provided with notebooks with dividers to enable them to address separately each claimant and each claim in the trial. The fact that the jury decided in favor of the government on some claims and in favor of the claimants in others belies any suggestion that their deliberations were not thorough. The evidence, briefly reviewed below,

supported the jury's verdict as to each claimant and each claim.

The following claimants sought the following amounts at trial: CONFECCIONES ZUNY LTDA, $440,000; CREACIONES IVONNE LTDA, $32,000; CREACIONES KAREN LTDA, $756,625; INCOLCO LTDA, $1,000,000; MANUFACTURAS DE MODAS LTDA, $400,000; TOTE EXPORT MANUFACTURAS LTDA, $392,860; VALERY FASHIONS LTDA, $448,418; ABUCHAIBE HNOS., $200,000 and $54,070; COMERCIAL ESTRELLA LTDA, $301,500; CONFECCIONES Y TEJIDOS NACIONALES LTDA, $549,990; CREACIONES VIVIANA LTDA, $125,025, $50,030, and $50,000; INDUSTRIAS MARATHON LTDA, $805,194.49; MANUFACTURAS INTERNACIONALES LTDA, $599,970; MANUFACTURERA DEL ATLANTICO LTDA, $492,810; SIRACUSA TRADING CO. and the HEIRS OF HERIBERTO

CASTRO-MESA, $3,400,000; MANUFACTURAS J.D. LTDA, $98,991; ORGANIZACION J.D. LTDA, $98,990 and $98,800; and CONFECCIONES ELIZABETH LTDA, $40,000.

The evidence of the claimants indicated -- if believed -- that massive shipments of manufactured garments were sent abroad from modern plants in Colombia to Panama in order to earn dollars legitimately. There they were handed over to ship captains who toured the Caribbean islands trading the garments for goats and local produce, losing some, having some stolen, and with the remainder disposed of through charity in Colombia and other non-traceable channels. Although possible, these and other implausible stories told by claimants' witnesses would justify the jury's skeptical view of the claimants'

somewhat inconsistent positions.

The evidence of drug tainting was overwhelming. A flurry of wire transfer activity followed the arrests of the Londono associates Jurado, Garcia, and Mahecha in Luxembourg. There was a sophisticated and complicated series of connections and financial transactions between the various drug-connected players in this case. After a description of one technique described at trial, the evidence will be more generally summarized.

1. INDUSTRIAS MARATHON LTDA

When the Londono associates were arrested in Luxembourg, authorities seized telephone books, documents, and bank records. Garcia had a business card with a bank account number written on the

reverse. The same number had appeared on one of the faxes intercepted by the Luxembourg Surété Publique from Jurado's apartment in Luxembourg. The account was at a bank in Guernsey, Channel Islands.

Investigation by the Surété revealed that Garcia earlier had arranged for $805,194.49 to be sent to the Guernsey bank from Panama by a Panamanian shell corporation nominally headed by Heriberto Castro-Mesa and Esperanza Rodriguez de Castro, Londono's parents-in-law. Funds from the account in Panama which was the source of the $805,194.49 had been used in 1987 to open other accounts in the name of Heriberto Castro-Mesa and Esperanza Rodriguez de Castro. The other funds in the Panamanian account were forfeited after the Luxembourg trial of Jurado and Garcia.

When $805,194.49 was electronically transferred to Colombian claimant Industrias Marathon via a New York bank immediately after the arrests in Luxembourg, the money was seized. The testimony of the Analyst Holmes, the C.P.A. Kostoglian, and the former Londono associates confirmed the illicit source of the funds. The evidence was sufficient for a jury to conclude that the funds were the traceable proceeds of illegal drug money-laundering and narcotics transactions, and that claimants were aware of the drug-related sources of the funds.

2. OTHER FORFEITED CLAIMS

At the Luxembourg arrests several pocket address books were seized. Garcia's book contained the telephone

numbers for representatives of the claimants, linking them with a known money-changer and drug money-launderer, Jairo Carrascal. In Colombia authorities seized a telephone book from another known drug money-launderer, Roberto Juri. Many of the numbers in the two telephone books, seized continents apart, were identical.

Witnesses also testified that the bank accounts and records of the corporate claimants were inconsistent with the conduct of a legitimate clothing manufacturing enterprise. The evidence at trial conclusively established that the corporate records and bank statements revealed a pattern of huge same day deposits and debits reflective of drug money-laundering practices.

Special Customs Agent Steven Haywood

of the United States Customs Service set up a phony bank account and entered the drug money-laundering business as a purported money-changer. Periodically he received large amounts of cash driven in cars from the New York City area, originating in cocaine sales there. While conducting his covert money-laundering investigative operation, Haywood was instructed by a money-changer to send electronic funds transfers to corporations including claimants. Special DEA Agent Robert Michaelis testified that an account at Banco Cafetero in Panama was used by Londono and his associates to store and move narcotics proceeds. The account was identified only by a number. Money was transferred from the Banco Cafetero account to the claimants. Claimants also

received electronic funds transfers from several of the identified shell corporations set up by Londono's associates.

Claimants objecting to the verdicts of forfeiture have made no showing that the evidence "reasonably permits only a conclusion in the[ir] favor." Sirota v. Solitron Devices, Inc. 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Louis Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The verdicts as to each claimant and each claim were supported by the evidence. The motions for judgment notwithstanding the verdict are denied.

3. MANUFACTURAS J.D. LTDA -- $98,991
ORGANIZACION J.D. LTDA -- $98,990 and $98,800

The jury at trial determined that

claimants Manufacturas J.D. and Organizacion J.D had met their burden of proving that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

4. CONFECCIONES ELIZABETH LTDA - $40,000

The jury at trial determined that even though the funds claimed by confecciones Elizabeth were the traceable proceeds of illegal drug activity and drug money-laundering transactions, claimant had met its burden of proving that it was an innocent owner. It did not "know," through its books and records

or corporate representatives and agents, that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

B. MOTION FOR A NEW TRIAL

The court has the power to grant a new trial, even where the verdict was justifiable, to prevent a miscarriage of justice. Under Rule 59(a) of the Federal Rules of Civil Procedure, a court may grant a new trial if

> the jury has reached a seriously erroneous result, or . . . the verdict is a "miscarriage of justice" i.e. . . . the verdict is against the great weight of the evidence . . .

Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983). The standard is difficult to meet. The claimants have raised a number of arguments in support of their motion for a new trial. Each will be addressed in turn.

1. SHIFTING BURDEN OF PROOF

At the hearing on the post-trial motions claimants posed the question whether the shifting of the burdens of proof in forfeiture cases in constitutional. Were a constitutional violation found, a new trial or dismissal would be required. No such remedy is necessary.

The Second Circuit in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), discussed the probable

cause requirements where moneys in bank accounts are at stake:

> In almost all cases, once the Government has shown probable cause to believe that someone has sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains "traceable proceeds" of the sale. . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . are "traceable proceeds" of the drug sale.

Id. at 1160. The court went on to discuss the concerns about burden-shifting and the difficulty of proof:

> No doubt uncertainty caused by the fungibility of money will make it difficult and in may cases impossible for claimants to satisfy this burden. But it is precisely the function of burden of proof rules to determine which party loses where evidence is lacking or at best ambiguous. Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, once probable cause has been established.

Id.

The district court is bound by the Second Circuit's determination that Congress' allocation of the burdens of proof in forfeiture proceedings is constitutional. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). The court wrote: "we find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases . . . ." Id. at 814; United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982) (same), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984); United States v. $250,000 in United

States Currency, 808 F.2d 895, 901 (1st Cir. 1987) (shifting burdens does not violate fifth amendment); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("We . . . find the burden-shifting aspect of the statute constitutional."); United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam) (imposition of burden of proof on the claimant is not unconstitutional); Bramble v. Richardson, 498 F.2d 968, 970 n.2 (10th Cir.) ("[Claimant]'s conception of the forfeiture proceedings is not entirely accurate. . . . [T]he burden merely shifts to [him] once probable cause has been established."), cert. denied sub nom. Bramble v. Saxbe, 419 U.S. 1069 (1974); see also United States v. Blackwood, 47 F.2d 849, 851-52 (1st Cir.)

(imposing burden of proof on the government was error where probable cause had already been found), cert. denied, 284 U.S. 627 (1931). The motion for a new trial on this ground must be denied.

2. SEPARATE TRIALS

Claimants argue that they were prejudiced by the court's refusal to grant separate trials. The claimants contend that the jury was unable to keep the evidence separated as to each claimant and ascribed to some claimants evidence of drug tainting related solely to other claimants. Claimants move for a new trial on this ground.

The court first addressed the issue of prejudice from joinder in allocating peremptory challenges among the claimants at the outset of the trial. The jury

panel was not large enough to permit each claimant to independently exercise a full set of peremptory challenges. Many potential jurors did not feel they could be fair in a drug-related case. Ultimately a jury representative of the community was selected.

Sharing of peremptory challenges was proper because the interests of the claimants were not adverse to one another. Accord Doralee Estates Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (plaintiff allowed his three challenges but defendant and third-party defendant required to exercise one each and three jointly); Carey v. Lykes Bros. S.S. Co., 455 F.2d 1192, 1194 (5th Cir. 1972) (district court's sharing procedure "expressly authorized by Section 1870"); Moore v. South African

Marine Corp., 469 F.2d 280, 281 (5th Cir. 1972) (no error to require shared challenges even where party objects).

Separate trials were not required because the claimants' interests were not hostile. All claimants had the same burden against the government and all wanted the return of their funds. Although some evidence of the background drug money-laundering scheme overlapped, each claimant presented its own evidence to meet its own burden of proving that the funds it claimed were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The fact that some claimants were required to prove both the legitimate source of funds and that they were innocent owners, whereas others attempted to prove only that they were

innocent owners, does not change this conclusion.

Severance would have severely burdened the court and government. Accord City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 549-50 (E.D.N.Y. 1987). Separate trials would have been a waste of judicial resources and would have caused extreme inconvenience to witnesses. The trial was prolonged even in its combined form because of the necessity for translation of the bulk of the testimony and the need to instruct the jury on technical financial matters. Denial of the motion to sever in such circumstances is proper. Cf. United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D.W. Va 1971) (motion for separate trial denied to avoid protracted delay and duplication of

effort). Whether to order separate trials is within the discretion of the trial court. Brown v. Advantage Eng'g, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990); Keister v. Dow Chem. Co., 723 F. Supp. 117, 120 (E.D. Ark. 1989).

That the jury was not confused or claimants prejudiced is reflected in the discriminating verdicts, finding some claims valid and other invalid. The precise questions of the jurors during deliberations, their note-taking, and their calm attentiveness all belied confusion or prejudice. A joint trial was proper.

3. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Claimants charge that the court erred in permitting the government to introduce into evidence wire transfer

advises obtained in violation of the Omnibus Crime Control and Safe Street Act, 18 U.S.C § 2510 et seq. (1988 & Supp. III 1991), the federal wiretap statute. The statute prohibits the interception of "electronic communications." which includes a variety of technologies such as electronic funds transfers and electronic communications in storage.

The court has already addressed the claimants' arguments, in ManufacturasInternational Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). The complaint was dismissed on the ground that the federal wiretap statute does not apply to the seizure of electronic funds transfers by banks following government

and court instructions. See 1992 WL 96212, at *10; 1968 U.S. Code Cong. & Admin. News 2112, 2153; United States v. Herring, 933 F.2d 932, 934-35 (11th Cir. 1991) (amendments did not change statute's focus on surveillance and eavesdropping).

The wiretap statute does not apply because in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. §981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991) ("relation-back" doctrine); See, e.g., United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd sub nom. United States

v. Schiferli, 895 F.2d 987 (4th Cir. 1990). As the Consolidated Bank Cases court wrote:

> The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

1992 WL 96212, at *10.

Finally, claimants' unsupported assertion that the introduction into evidence of the wire transfer advises violated the fourth amendment is groundless. The motion for a new trial on this ground is denied.

4. NEW YORK BANKS

Claimants contend that the court erred in not overruling the protective order granted by the magistrate judge.

The magistrate judge prohibited the claimants from taking depositions or issuing subpoenas to employees of the intermediary New York banks which seized the wire transfers. In their deposition and subpoena requests claimants sought information about the instructions given to the banks by the United States Attorneys.

In Consolidated Bank Cases, __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992), the court disposed of claimants' concerns about the seizure of the subject funds by the New York banks. The court dismissed the action for failure to state a claim, noting that the banks were not

> rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court.

Id. at *15. Since electronic funds

transfers are affected rapidly, the government must be permitted to act without any interference by the banks. The banks normally should not make any independent determinations.

Where banks act as agents of the court they are protected. Id.; cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (same where bank executes writ of attachment). Claimants require nothing further from the employees of the bank. The protective order was proper.

5. UNITED STATES ATTORNEYS

Claimants complain that the court granted the government's motion in limine barring claimants from calling the United States Attorneys as witnesses at trial. The court has twice addressed claimants'

desire to elicit information from the United States Attorneys.

During discovery claimants sought to depose the United States Attorneys involved in this case, but the magistrate judge granted the government's motion for a protective order. The magistrate judge determined that the taking of opposing counsel's deposition is permissible only where (1) there is no other way to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

The protective order was granted in part because the information could be obtained elsewhere and in part because it is undesirable for United States

Attorneys to appear as witnesses at trial to defend statements made at deposition. The magistrate judge's decision was proper. The court dismissed an action filed by claimants against the United States Attorneys who had instructed the banks to seize the funds. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision). The claimants have offered nothing to alter the conclusions reached by the magistrate judge and the district judge. There was no relevant information to be obtained from the United States Attorneys who acted ethically and responsibly in connection with the seizure of wire transfers at the New York correspondent banks.

6. EXPERT TESTIMONY

Claimants objected to the court's

permitting DEA Intelligence Analyst Holmes and Special DEA Agent Michaelis to testify and to state opinions. Agent Michaelis testified on the basis of the evidence and known drug money transfer techniques that several of the electronic wire transfers wee intended for receipt by Jose Santa Cruz Londono. There was also testimony about the existence of an overall drug money-laundering scheme. This testimony was based on the evidence at trial as well as the expertise of the witness.

Given the complex nature of the evidence, the jury was aided by this expert testimony. See Fed. R. Evid. 702, 703. Its probative force heavily outweighed any prejudice. Id. Rule 403. DEA agents may testify as experts on illegal activities such as narcotics

dealing. United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179, cert. denied sub nom. Estrada Ruis v.United States, 494 U.S. 1068 (1990). Sophisticated drug money-laundering activities, such as those relied upon by claimants, are a proper subject for expert testimony. The methods of moving of currency internationally and the maintaining of corporate and bank records are not subjects easily understood without some expert assistance. The jury was repeatedly admonished not to substitute the expert's opinions for the jury's own conclusions about the veracity of the testimony and the meaning of the records which constituted the bulk of the evidence.

The court has broad discretion in

determining the qualifications of and need for expert witnesses. Hamling v. United States, 418 U.S. 87, 108 (1974). Claimants have not demonstrated that the court's determination was "manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35 (1962). The witnesses were properly qualified and their limited testimony useful and non-prejudicial.

7. BEST EVIDENCE RULE

Claimants' argue that the government's expert accounting witness should not have been permitted to testify as to capital investment, accounting and banking practices, and estimated profits from business enterprises. The testimony was amply supported by, and required by, the huge amount of financial documentary

evidence.

Claimants argue that this testimony violates the best evidence rule. The best evidence rule refers to and governs the admission of the contents of "a writing, recording, or photograph." See Fed. R. Evid. art X. It has no application to the testimony of an expert witness summarizing and analyzing evidence already in the record. Cf. id. Rule 1006. The objection is groundless.

C. MOTION TO RELEASE RES

Claimants Manufacturas J.D and Organizacion J.D., which sustained their burden at trial of proving that their claimed funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions, move for the immediate release of their funds.

The government seeks a delay in the release of funds on the grounds that Johnny Daccarett, the owner and legal representative of claimant corporations Manufacturas J.D. and Organizacion J.D., is a fugitive.

The government contends that Johnny Daccarett has a prior conviction for trafficking in approximately two tons of marijuana. There is also an outstanding indictment against him in New Jersey for tax violations. It is the government's position that since Daccarett is a fugitive, the claimant corporations he represents should be barred under the disentitlement doctrine from receiving funds they rightfully claim.

The disentitlement doctrine provides that one who is a fugitive from justice cannot seek relief from the judicial

system the authority of which he is flouting by fleeing prosecution. If a party is avoiding prosecution for a crime, he cannot lay claim to money or property in a related civil proceeding. See, e.g., United States v. 760 SW 1st Street, Miami, Fla., 702 F. Supp. 575, 577 (W.D.N.C. 1989) ("[since he] fits the definition of a fugitive, . . . he may not demand to use the resources of this Court in a civil action to claim property").

1. FUGITIVE STATUS

The first question is whether Daccarett can be considered a fugitive. Claimants Manufacturas J.D. and Organizacion J.D. contend that there has been no showing that Daccarett was ever in this jurisdiction, let alone a showing

that he fled to avoid prosecution.

A person can be a fugitive even when he does not "flee" but is simply found outside the jurisdiction. See Jhirad v. Ferrandina, 536 F.2d 478, 483-84 (2d Cir.) (no meaningful distinction between those leave the jurisdiction and those who have already left and decide not to return), cert. denied, 429 U.S. 833 (1976); United States v. 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118, 121 (E.D.N.Y. 1990) ("An individual who learns of charges against him while legally outside the jurisdiction 'constructively flees' by deciding not to return."), aff'd sub nom. United States v. Eng, 951 F.2d 461 (2d Cir. 1991). To be considered a fugitive, the individual need not flee or "constructively flee" with the intent of avoiding a pending or

intended prosecution. United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) ("whether [he] left before or after . . . indictment is irrelevant"; nor need there even be an official indictment handed down). Even where an individual is in prison elsewhere or it is otherwise impossible for him to leave, he can be considered a fugitive. See, e.g., United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee even though confined in prison in another jurisdiction.").

It is critical to show that the person sought in the criminal proceeding knows he is wanted by the authorities and then fails to submit to arrest. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 644 (1st Cir. 1988) ("Perhaps most importantly, there

is no evidence that [the claimant] had notice of this proceeding . . . ."); United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323-24 (9th Cir. 1978) (intent to avoid prosecution, making an individual a fugitive, can be inferred where he knows the authorities want him and he fails to surrender); United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) (noting that individual was "aware of both the indictment and the civil forfeiture action"); United States v. Schreiber, 535 F.Supp. 1359, 1363 (S.D.N.Y. 1982) (individual who left the country in 1964 became a fugitive in 1966 when he learned he was under indictment and made no effort to return).

We assume that Daccarett was aware of the criminal charges pending against

him since the government brought this fact to claimants' attention, and, through them, to their representative Daccarett. There was no legal barrier to his return to the United States. He should be, and is, treated as a fugitive.

2. "DISENTITLEMENT" DOCTRINE

An individual who is a fugitive can be barred by the disentitlement doctrine from receiving seized funds. By extension, the government's position is that the claimant corporations which Daccarett represented should also be prevented from receiving the funds they claim. A brief explanation of the disentitlement doctrine and its development is necessary to understand the parties' positions.

The first statement of the

disentitlement doctrine was in the context of a criminal proceeding, where the Supreme Court declined to adjudicate an appeal from the merits of a conviction where the appellant was a fugitive. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). Courts extended this doctrine to bar a fugitive from participating in a civil proceeding based on a prior criminal proceeding. In Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982), the Ninth Circuit held that a fugitive could not contest the assessment of tax liabilities in a civil proceeding where he was a fugitive from the related criminal tax proceeding.

Finally, in 1985 the Ninth Circuit held that the disentitlement doctrine should apply in civil forfeiture proceedings. United States v. $129,374

in United States Currency, 769 F.2d 583, 587-88 (9th Cir. 1985), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986). The doctrine bars not only the fugitive but also the fugitive's successor from contesting the forfeiture while at the same time resisting prosecution in a related criminal action. Id. at 587. No case has been found addressing the question now posed: whether a corporation represented by a fugitive should also be barred by the disentitlement doctrine from claiming funds in a forfeiture proceeding.

A trial court has discretion in applying the disentitlement doctrine. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("this matter resides within the sound discretion of the Court"). The reasons for exercising

discretion in the claimants' favor are overwhelming. First, in this case no credible evidence has been submitted demonstrating that the "fugitive" controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for claimants Manufacturas J.D. and Organizacion J.D. asserts that Daccarett has been willing to be deposed in person at an embassy in Colombia or by telephone but the government has refused.

Finally, the civil forfeiture is independent of the criminal case pending against Daccarett. In disentitlement cases the criminal indictment, prosecution, or potential prosecution

should be related to the forfeiture proceeding. United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("[the] criminal conviction and the property involved . . . are integrally related parts of the same unlawful drug dealing scheme"), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986); Schuster v. United States, 765 F.2d 1047, 1049 (11th Cir. 1985) ("no question that the civil case . . . is related to the criminal case"); United States v. $45,940 in United States Currency, 739 F.2d 792, 794 (2d Cir. 1984) (question is whether his fugitive "status bars him from defending the related forfeiture proceeding") (emphasis added). In this All Funds case, the indictment at issue is in a different district and it is for tax

violations. The government has not suggested that the tax violations are related to the drug money-laundering activities underlying this All Funds action.

It is the claimant corporations, Manufacturas J.D. and Organizacion J.D., which prevailed at trial -- not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimants from receiving their funds. The jury found that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. Daccarett's status as a fugitive is irrelevant. The motion to release the res must be granted.

D. MOTION TO STAY JUDGMENT AND WAIVE SUPERSEDEAS BOND

Claimants Abuchaibe Hnos., Comercial

Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda move for an order staying execution of judgment pending appeal without posting a supersedeas bond.

Since the funds are in the possession of the court and gathering interest, there will be no prejudice to the government from a stay of execution of judgment. Nor is there any risk that the property will be removed:

> Unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. . . . Having prevailed below, the government, if it wins on appeal is assured of execution regardless of whether [claimant] files a bond or stays execution of the judgment.

United States v. $95,945.18 in United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); see also United States v. One Lot of $25,721 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991) (supersedeas bond not required).

IV. CONCLUSION

The jury's verdict of forfeiture of eighteen of the twenty-two amounts seized is fully supported by the evidence. The motions for judgment notwithstanding the verdict are denied. No errors warrant granting the motions for a new trial. The amounts claimed by Manufacturas J.D. and Organizacion J.D. are ordered released in seven days from the date of this memorandum; the delay will permit application for a stay in the Court of Appeals. Execution of the judgment of

forfeiture of funds claimed by Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda is stayed during the pendency of the appeal. No supersedeas bond is required.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
FINAL JUDGMENT -against-	AND ORDER
ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL., Defendants.	cv-90-2510

The issues in the above-captioned action were tried before a jury in the Eastern District of New York from March 9, 1992 through May 8, 1992; and

Nineteen claimants and the plaintiff UNITED STATES OF AMERICA presented witnesses and documentary evidence; and

The jury considered the issues in this action and, after due deliberation, rendered a unanimous verdict on May 8, 1992 forfeiting the following funds to plaintiff UNITED STATES OF AMERICA after deciding that the following fifteen claimants had failed to meet their burden of proving that the eighteen claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions or that they were innocent owners:

1. Claimant: CONFECCIONES ZUNY LTDA
   Amount: $440,000
2. Claimant: CREACIONES IVONNE LTDA
   Amount: $32,000
3. Claimant: CREACIONES KAREN LTDA
   Amount: $756,625
4. Claimant: INCOLCO LTDA
   Amount: $1,000,000
5. Claimant: MANUFACTURAS DE MODAS LTDA
   Amount: $400,000
6. Claimant: TOTE EXPORT MANUFACTURAS LTDA
   Amount: $392,860
7. Claimant: VALERY FASHIONS LTDA
   Amount: $448,418
8. Claimant: ABUCHAIBE HNOS.
   Amount #1: $200,000
   #2: $54,070
9. Claimant: COMERCIAL ESTRELLA LTDA
   Amount: $301,500
10. Claimant: CONFECCIONES Y TEJIDOS NACIONALES LTDA
    Amount: $549,990
11. Claimant: CREACIONES VIVIANA LTDA
    Amount #1: $125,025
    #2: $50,033
    #3: $50,000
12. Claimant: INDUSTRIAS MARATHON LTDA
    Amount: $805,194.49
13. Claimant: MANUFACTURAS INTERNACIONALES LTDA
    Amount: $599,970

14. Claimant: MANUFACTURERA DEL ATLANTICO LTDA
Amount: $492,810
15. Claimant: SIRACUSA TRADING Co. and the HEIRS OF HERIBERTO CASTRO-MESA
Amount: $3,400,000; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sum of $98,991 to claimant MANUFACTURAS J.D. LTDA after deciding that the claimant had met its burden of proving that the claimed amount was not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sums of $98,990 and $98,800 to claimant ORGANIZACION J.D. LTDA after deciding that the claimant had met its burden of proving that the two claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

They jury rendered a unanimous verdict on May 8, 1992 returning the sum of $40,000 to claimant CONFECCIONES ELIZABETH LTDA after deciding that the claimant had met its burden of proving that it was an innocent owner of the claimed amount.

ORDERED AND ADJUDGED that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court,

less fees, is hereby condemned and forfeited to the use and benefit of the UNITED STATES of AMERICA; and that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, be turned over to the UNITED STATES OF AMERICA in seven days and that the Clerk of the Court issue a check in the total amount payable to "United States Marshals Service" and then forward that check to United States Attorney, ATTN: Arthur P. Hui, Esq., One Pierrepont Plaza, 11th Floor, Brooklyn, NY 11201; this order is stayed pending completion of appeals.

ORDERED AND ADJUDGED that the sum of $98,991 plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant MANUFACTURAS J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Manufacturas J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sums of $98,990 and $98,800, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant ORGANIZACION J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Organizacion J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso

2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sum of $40,000, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant CONFECCIONES ELIZABETH LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Davis Markel & Edwards - Trust Account" and then forward that check to M. Blair Sibley, Esq., Davis Markel & Edwards, 66 West Flagler Street, Suite 1100, Miami, Florida 33130.

ORDERED, ADJUDGED, AND DECREED that pursuant to Rules 54(b) and 58 of the Federal Rules of Procedure the Clerk of the Court enter final judgment.

SO ORDERED.

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Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1264, 1265---August Term 1992

(Argued: April 2, 1993
Decided: Sep. 10 1993)

Docket Nos. 92-6229, 92-6259

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at the MERRILL LYNCH BANK 1 Columbus;PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF

NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO CAMPO; ANA MILENA SANTA CRUZ;RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON

LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants,

EMPRESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-Claimants.

BEFORE:

OAKES, PIERCE, and PRATT,
Circuit Judges.

Appeal in a civil forfeiture case from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying motions for judgment notwithstanding the verdict and for a new trial, releasing amounts claimed by two claimants, and forfeiting the funds claimed by all other claimants.

Affirmed.

ISIDORO RODRIGUEZ, Barranquilla, Colombia S.A., for Defendants-Appellants Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.

MONTGOMERY BLAIR SIBLEY, Miami,FL (Davis, Markel & Edwards, of counsel), for Defendants-Appellants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Tote Export Manufacturas Ltda., and Creaciones Ivonne.

ARTHUR P. HUI, Assistant United States Attorney, Brooklyn, NY (Mary Jo White, United States Attorney for the Eastern District of New York, of Counsel), for Appellee.

PRATT, Circuit Judge:

INTRODUCTION

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers continually seek to make their ille-

gal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, their monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated

> that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers.

House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986). The arteries of international banking systems have become the "lifeblood" of the international drug trade. See 132 Cong. Rec. S9938, S9986 (daily ed. July 31, 1986); President's Comm'n on Organized Crime,

The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 4-8 (1984).

In an attempt to stop the flow of illicit money back to drug suppliers, congress in the past decade has passed several acts aimed at drug-trafficking and money-laundering activities. See, e.g., International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914, codified at 12 U.S.C. §§ 635, 22 U.S.C. §§ 2151, 2291; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. §§ 1956, 1957. While a money-laundering conviction results in automatic forfeiture to the government of any property involved in the offense, see 18 U.S.C. § 982(a), the government can also institute civil forfeiture

proceedings without first obtaining a conviction. See 18 U.S.C. §981. This case tests the effectiveness of civil forfeiture as a tool for seizing and forfeiting proceeds of narcotics trafficking as they pass through our banking system.

FACTS AND BACKGROUND

There are two groups of claimants: the "Atlantico Claimants", consisting of Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.; and the "Barranquilla Claimants", consisting of

Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. Both sets of claimants appeal from a final judgement and other rulings of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, following a jury verdict that forfeited to the government more than $10,000,000, pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds) (technical amendment to opinion filed on Sept. 14, 1992).

The forfeitures arose out of an international effort to impede the drug-

trafficking and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz-Londoño, which allegedly imports approximately 3000 kilograms of cocaine a month into the United States. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indicating the amount of money to be transferred, the sending bank, the receiving bank, and the intended benefi-

ciary. The Central Computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, ff the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

The seizures at issue were precipitated by the arrests of three Santacruz-Londoño associates in Luxembourg on June 28 and 29, 1990. These men had opened hundreds of bank accounts throughout Europe and deposited large sums of money in them for the Cali cartel. Anticipating that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Luxembourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel. During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of $ 30 million in Europe, $ 16 million in Panama, and $ 12 million in the United States.

The $ 12 million seized in the United States was the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks, including Banco Atlantico, Manufacturers Hanover, The Bank of New York, and Merrill Lynch. After receiving the subject EFTs, the intermediary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the beneficiaries that the funds were available. However, through both oral orders and a series of eight arrest warrants in rem, government agents instructed the intermediary banks in New York to attach "all funds" on deposit in the names of various individuals and entities con-

nected with Santacruz-Londoño and "all related entities and individuals", and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.

Each successive warrant included more names. If the government agents seized funds destined for a corporation not yet named in the complaint, it would amend the complaint to add that corporation's name soon after the seizure. By the seventh amended complaint and its accompanying warrant, all but one of the claimants in this action were explicitly named. The Drug Enforcement Agency

("DEA") also subpoenaed from the intermediary banks financial records of any accounts related to the entities named in the complaint.

The ten Atlantico Claimants and seven Barranquilla Claimants (collectively "claimants"), purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to approximately $ 6.5 million of the seized funds, denied all of the allegations in the in rem complaint, and claimed that their monies had been derived from legitimate sales of clothing. The Atlantico Claimants also brought two counterclaims, seeking damages for alleged violations of the fourth and fifth amendments, of the Electronic Communications Privacy Act, see 18 U.S.C. §§ 2510-2520 and §§

2701-2710, of the Right to Financial Privacy Act, see 12 U.S.C. §§ 3401-3422, of the Federal Tort Claims Act, see 28 U.S.C. §§ 2671-2680, and of the civil forfeiture statutes, see 21 U.S.C. § 881; 18 U.S.C. § 981. Their counter-claims were dismissed before trial.

In a related action, claimants sued the intermediary banks in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, for loss of the use of their funds and violation of various federal and state statutes. Judge Weinstein granted summary judgment for the banks, holding that they could not be held liable for following government orders respecting claimed government funds. Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., 792

F.Supp. 180, 196 (E.D.N.Y. 1992) (Consolidated Bank Cases).

In still another related action, claimants sued the United States attorneys who had ordered the banks to seize the funds; Judge Weinstein dismissed that suit for failure to state a claim. Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

On May 13, 1991, after an ex parte, in camera hearing, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. §881(i) and 18 U.S.C. § 981(g). Two weeks later, Judge Weinstein held a

three-day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. Claimants' motion to vacate the probable-cause finding and to suppress evidence obtained by the DEA subpoenas were denied on February 19, 1992.

On March 9, 1992, a two-month jury trial began. The government presented extensive evidence, including corporate and banking records from all over the world and the testimony of witnesses familiar with the Cali cartel's operations. That evidence linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The claimants tried to show that the monies were the legitimate profits from sales of clothing made in Colombia and

Panama. They claimed that massive shipments of clothing were handed over to ship captains who toured the Caribbean islands, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipments through charitable means. All Funds, 801 F. Supp. at 992.

The jury found that eighteen of the twenty-two amounts seized were forfeitable. For the remaining amounts, the jury found that those claimed by Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. were not traceable proceeds of illegal money-laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. After the trial, those claimants who received an adverse jury decision moved

for judgment notwithstanding the verdict and for a new trial; both motions were denied. Judge Weinstein ordered the release of the amounts found not to be forfeitable and stayed execution of the forfeitures pending this appeal. Most of the claimants have appealed. However, Siracusa Trading Company, a claimant whose funds were seized from Merrill Lynch's office in Columbus, Ohio, and Confecciones Elizabeth Ltda. the claimant found to be an innocent owner, did not appeal.

Comercial Samora, one of the Atlantico Claimants, has also appealed, although it did not participate in the civil forfeiture trial. On the first day of the trial, Comercial Samora withdrew its verified claim and all other papers that it had filed in the proceed-

ings. Judge Weinstein consequently entered a separate judgment of forfeiture on June 5, 1992, against the $124,000 originally claimed by Comercial Samora; in his August 5, 1992, opinion, Comercial Samora is noticeably absent from the list of claimants at trial. All Funds, 801 F. Supp. at 992. Nevertheless, Comercial Samora has appealed with the rest of the Atlantico Claimants from the August 5, 1992, judgment; it did not file a separate brief on appeal, and no separate arguments were made on its behalf.

The claimants, including the two whose funds were found not to be the proceeds of illegal drug trafficking, raise numerous issues on appeal, challenging the validity of the seizures and pleadings, various aspects of the trial,

dismissal of the counterclaims, and the district court's allowance of the execution of an IRS levy. For the reasons stated below, we affirm.

DISCUSSION

The conceptual underpinnings of civil forfeiture can be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. See United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 401-02 (2d Cir.) (St. Nicholas Ave.) (discussing historical origins of forfeiture), cert. denied, 61 U.S.L.W. 3772 (1993). Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "property used in violation of law was itself

the wrongdoer that must be held to account for the harms it had caused." United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135 (1993) (Buena Vista Ave.). Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings. Id.

Civil forfeiture has recently gained new life as an instrument of federal law enforcement, particularly as a weapon in the "war on drugs". As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, congress strengthened civil forfeiture as a means of confiscating illegal substances and the means by which they are manufactured and distributed. Pub. L. No 91-513, 84 Stat. 1276 (1970), codified at 21 U.S.C. §§ 881-896. In 1978 congress amended

the act to authorize the seizure and forfeiture of the proceeds of illegal drug transactions as well. The statute provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] all proceeds traceable to such an exchange." Pub. L. No. 95-633, 92 Stat. 3777 (1978), codified at 21 U.S.C. § 881(a) (6) (emphasis added).

Now "one of the most potent weapons in the judicial armamentarium", see United States v. 384-390 West Broadway, 964 F. 2d 1244, 1248 (1st Cir. 1992) (West Broadway) (discussing widespread use of in rem proceedings against drug offenders, civil forfeiture has become a

favored method for imposing significant economic sanctions against narcotics traffickers. However, the ease with which the government can seize property and the potential hardships caused to innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike. Given that the reach of civil forfeiture is constantly expanding to new realms -- in this case, to electronic funds transfers between banks -- the courts must ensure that constitutional and procedural safeguards remain intact.

A. Seizures.

There are three ways the government can institute civil forfeiture in rem proceedings under 21 U.S.C. § 881. First, it can follow the process set

forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"). 21 U.S.C. § 881(b). Second, it can obtain a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, which requires a finding of probable cause ex parte by a judicial officer. Fed. R. Crim. P. 41(c). Third, it can seize property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). See St. Nicholas Ave., 983 F. 2d at 402 (discussing three options); United States v. 4492 S. Livonia Rd., 889 F 2d 1258, 1262-63 (2d Cir. 1989) (Livonia Rd.) (same). In this case, the government used the first and third options, neither of which requires pre-

seizure judicial approval. See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F. 2d 1428, 1432 n.5 (11th Cir. 1991).

Before analyzing the validity of the seizures here, we note that even when the initial seizure is found to be illegal, the seized property can still be forfeited. See United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990) (holding that "illegal seizure of property does not immunize that property from forfeiture"). This is because seizure and forfeiture are two distinct events. While both require the government to have probable cause, the consequences of lack of probable cause may differ depending on the event. Absence of probable cause at the time of the seizure may

result in the suppression of evidence in later proceedings, but the defendant property itself cannot be suppressed from the forfeiture action. See id. In contrast, a failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether. See discussion Part B, infra.

1. Compliance with Supplemental Rules.

The seizures of at least nine of the EFTs followed the process prescribed by the Supplemental Rules. Under the Supplemental Rules, the government begins by filing a verified complaint in the district where the seizure (arrest of the property) will occur. Supp. Rule C(2). Ordinarily, the court must review the papers authorizing an arrest warrant

in rem. See Supp. Rule C(3). However, in actions for "forfeitures for federal statutory violations", as in this case, "the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the * * * property without requiring a certification of exigent circumstances." Id. (emphasis added).

Claimants argue that the in rem complaints failed to comply with the particularity requirements for pleadings set forth in the Supplemental Rules. Two rules address the level of particularity required in forfeiture complaints. Rule C(2) states that the complaint "shall describe with reasonable particularity the property that is the subject of the action." Rule E(2)-(a) specifies that the complaint must

"state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

These standards are more stringent than the general pleading requirements set forth in the federal rules of civil procedure, see Livonia Rd., 889 F.2d at 1266, and implicit accommodation to the drastic nature of the civil forfeiture remedy. West Broadway, 964 F.2d at 1248; see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3242 (1973). The particularity-of-pleading requirements in forfeiture cases provide a "way of ensuring that the government does not seize and hold,

for a substantial period of time, property to which, in reality, it has no legitimate claim." Livonia Rd., 889 F.2d at 1266 (quoting United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 638 (1st Cir. 1988)).

The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a "reasonable belief that the government can show probable cause for forfeiture at trial." United States v. U.S. Currency, in the Amount of $150,660.00, 980 F.2d 1200, 1204-05 (8th Cir.1992). In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government can demonstrate probable cause for find-

ing the property tainted. Id. at 1205; see also United States v. One Parcel of Real Property, 921 F.2d 370, 376 (1st Cir. 1990); Pole No. 3172, Hopkinton, 852 F.2d at 640.

Claimants contend that the in rem complaints did not contain a particular description of the funds to be seized or sufficient allegations to link the funds to illegal drug activity. More specifically, they argue that the use of the phrase "all related entities and individuals" in the complaint unduly broadened the scope of the warrant and impermissibly gave the government "full discretion" to seize whatever property it desired.

Whether a forfeiture complaint is sufficiently particularized to reach a given piece of property is an issue of

law subject to plenary review. West Broadway, 964 F.2d at 1248; U.S. Currency, in the Amount of $150,660.00, 980 F.2d at 1204. In determining whether a complaint satisfies rule E(2) (a), a court may also consider supporting affidavits that may cure a lack of particularity in the complaint itself. Livonia Rd., 889 F.2d at 1266.

If the complaint had described the subject properties as simply "all funds on deposit in any accounts maintained * * * in the name [] of * * * Jose Santacruz-Londoño" and "all related entities and individuals", without more, then the claimants' argument might be well taken. However, given that the names of the claimants were gradually added by the successive amendments to the complaint, we will discuss in this

section here only those seizures that were preceded by a complaint and arrest warrant that explicitly named the intended beneficiary. All other seizures, that is, those made before the complaint and arrest warrant specifically mentioned the EFT's intended beneficiary, will be treated as warrantless seizures, which are discussed in the next section. This approach will obviate any dependence on the "related parties" language in the warrant.

The successive complaints name as defendants "all funds on deposit" in certain banks "in the names of "various named claimants, "including, but not limited to" specific account numbers. The complaints allege that Santacruz-Londoño "caused substantial sums of monies" from narcotics trafficking and

money laundering to be transferred through accounts, "including the defendant accounts", and credited to accounts, including those of various named claimants. In addition, an international Letter Rogatory from the Eastern District of New York is incorporated by reference and attached to the complaint. It describes in greater detail the government's investigation since 1979 of Santacruz-Londoño, the arrests of the three cartel members in Luxembourg, and the use of Colombian shell corporations for disguising the illegal nature of the narcotics proceeds.

By naming both the intermediary banks through which the funds were to be transferred and the intended beneficiaries of the EFTs, the complaint

described the subject property with "reasonable particularity". See Supp. Rule C(2). By recounting Santacruz-Londoño's activities and methods of funneling his narcotics proceeds through various New York banks for ultimate deposit in Colombian bank accounts, the complaint states "the circumstances from which the claim arises" with sufficient particularity for the claimants to "commence an investigation of the facts and frame a responsive pleading". See Supp. Rule E(2).

In this case, the claimants filed verified claims and responsive pleadings to the Seventh Amended Complaint in rem without moving for a more definite statement. We conclude that the complaints and their accompanying warrants of arrest complied with the pleading

requirements of the Supplemental Rules.

2. Seizure without Judicial Process.

At least eleven of the amounts were seized either without a warrant or prior to the issuance of a warrant that explicitly named the intended beneficiary of the EFT. We will analyze all such seizures as warrantless seizures. When the "Attorney General has probable cause to believe" that property is subject to forfeiture under § 881, the government is authorized to seize the property without judicial process. 21 U.S.C. § 881 (b) (4).

Therefore, the question is whether the assistant United States attorneys, as representatives of the Attorney General, had "probable cause to believe"

that the EFTs were "subject to civil forfeiture under [§ 881]" at the time they requested the intermediary banks to attach the subject EFTs. Clearly they did. This is not a case in which the government "stumbled" into a seizure without any prior information about the subject property. See, e.g., $37,780 in United States Currency, 920 F.2d at 163 (holding that DEA agents at airport lacked probable cause to seize money from claimant's attaché case at time of seizure). Instead, they knew that Santacruz-Londoño, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his "businesses" in Colom-

bia.

There are two additional statutory requirements for seizures without judicial process. First, after seizure the government must institute forfeiture proceedings "promptly". 21 U.S.C. § 881 (b). Second, the proceedings should follow applicable customs laws, 21 U.S.C. § 881 (d), which are found at 19 U.S.C. §§ 1595a to 1615. In this case, the government satisfied both requirements. It filed a civil forfeiture complaint within days of each warrantless seizure, and the resulting forfeiture proceeding followed the applicable customs laws.

3. Fourth-Amendment Concerns.

Claimants argue that their fourth-amendment rights were violated in three instances: (1) when EFTs were seized

without a warrant; (2) when EFTs were seized pursuant to a rule C(3) warrant without a prior judicial determination of probable cause; and (3) when the government gained access to their financial records from the intermediary banks without a warrant.

The Fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched[] and the * * * things to be seized." U.S. Const. amend. IV.

a. The Warrant Requirement.

We first address the fourth amendment's applicability to warrantless sei-

zures made pursuant to 21 U.S.C. § 881 (b)(4). While some circuits have held that the fourth amendment's warrant requirement is inapplicable in light of the statute's plain language allowing seizure without judicial process, see, e.g., United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir.) (only need probable cause, not a warrant, because property subject to forfeiture is contraband), cert. denied, 454 U.S. 818 (1981); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983) (warrantless seizure of automobile pursuant to § 881 (b)(4) does not offend fourth amendment); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989) (warrantless seizure of automobiles used to facilitate drug transaction did not violate

fourth amendment), this circuit requires seizures made pursuant to § 881 (b)(4) to comport with the fourth amendment, see, e.g., United States v. LaSanta, 978 F.2d 1300, 1304-05 (2nd. Cir. 1992) (warrantless seizure of vehicle must meet a recognized exception to fourth amendment); cf. In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 311 (1st Cir. 1988) (fourth amendment applies to forfeiture seizures); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989) (same).

Therefore, to be valid the warrantless seizures must fall within one of the recognized exceptions to the fourth amendment's warrant requirement. LaSanta, 978 F.2d at 1305. The government argues that the exigent-circum-

stances exception justifies any warrantless seizures made in this case. They claim that EFTs can be "completed in a matter of minutes or hours", and therefore present "greater exigencies than the seizure of a conveyance[] or perhaps[] any other kind of property". Because the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here. The seizures made pursuant to § 881 (b)(4), therefore, did not violate the fourth amendment.

b. The Probable-Cause Requirement.

With respect to the EFT seizures that were made pursuant to an in rem warrant, claimants argue that because the warrants were issued "forthwith" by

a "clerk of the court", without a preceding probable-cause determination, see Supp. Rule C(3), they failed to satisfy the fourth amendment's probable-cause requirement. Several courts have held the Supplemental Rules' summary-warrant procedures unconstitutional. See, e.g., United States v. Life Ins. Co., 647 F. Supp.732, 742 (W.D.N.C. 1986) ("without a determination of probable cause by a qualified judicial officer, [§] 881(b) violates the Warrants clause of the Fourth Amendment"); United States v. $128,035 in U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio) ("procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedural requirements"), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Other courts have held that in rem warrants are not true "war-

rants" subject to fourth-amendment strictures. See, e.g., United States v. TWP 17 R 4, 970 F.2d 984, 987-89 (1st. Cir. 1992) (posting an in rem warrant on property not a seizure for purposes of fourth amendment); United States v. Turner, 933 F.2d 240, 245 (4th Cir. 1991) (in rem warrant more analogous to a summons, not a "warrant" within the meaning of fourth amendment).

In this circuit, just as warrantless seizures under § 881 (b)(4) must satisfy the fourth amendment, so must seizures made with warrants pursuant to the Supplemental Rules. Therefore, although the plain language of § 881(b) allows for the issuance of a warrant without probable cause, see, e.g., One 1978 Mercedes Benz, 711 F.2d at 1302 ("If [Attorney General] lacks probable

cause * * * he may file a verified complaint pursuant to the maritime rules and effect the seizure pursuant to that process"), the fourth amendment mandates the existence of probable cause at the time of seizure. $37,780 in U.S. Currency, 920 F.2d at 163 (fourth amendment requires government to have probable cause at the time it seizes money). However, the government need not obtain a judicial determination of probable cause prior to seizure. While "absent an `extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified", the Supreme Court has held that "such an extraordinary situation exists when the government seizes items subject to forfeiture."

United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 562 n.12 (1983) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633 (1974)).

Therefore, the government must have probable cause at the time the clerk issues the warrant in rem, but need not demonstrate that it had probable cause at the time of the seizure unless a claimant challenges the validity of the seizure. As discussed in section 2 above, the government had probable cause to believe that the defendant funds were the proceeds of illegal narcotics trafficking at the time they were seized.

c. Privacy Interests in Financial Records.

Finally, claimants argue that the DEA's subpoenas of all the financial records at the intermediary banks relating to the EFTs violated their fourth-amendment rights. The government contends that the claimants do not have any protectable fourth-amendment interest in the bank records at issue, because they are not customers of the intermediary banks. We agree. Claimants hold accounts with Colombian banks, which have accounts with the intermediary banks. 'The claimants' relationship with the intermediary banks is too remote to afford the claimants any legitimate expectation of privacy in information about EFTs being received by the intermediary banks.

Even if claimants had their own accounts with the intermediary banks,

information regarding those accounts would not be protected by the fourth amendment. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer had no "protected Fourth Amendment interest" in the copies of checks and other records the bank retained. Id. at 440. The Court stated that the fourth amendment "`at the most guards against * * * too much indefiniteness or breadth in the things required to be "particularly described," if * * * the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.'" Id. at 445-46 (quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946)).

The Court reinforced Miller in S.E.C. v. Jerry T. O'Brien, Inc., 467

U.S. 735 (1984), where the Securities and Exchange commission had subpoenaed an individual's financial records from two broker-dealer firms. The court held that the individual had no fourth-amendment claim, because once he gave his financial information to someone else, "even on the understanding that the communication [wa]s confidential," he could not object if the third party conveyed that information to law-enforcement authorities. Jerry T. O'Brien, Inc., 467 U.S. at 743 (citing Miller, 425 U.S. at 443). The Court also noted that a "target" of an investigation has no right to notice of subpoenas issued to third parties. Id. at 742-43.

Because the DEA was authorized to demand information regarding the EFTs

from the intermediary banks and the materials requested were relevant to their investigation, we conclude that no fourth-amendment violation occurred here.

4. Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") prohibits "financial institutions" from giving the government access to "the information contained in the financial records of any customer" absent a search warrant, subpoena, court order, formal written request, or customer authorization. 12 U.S.C. § 3402. Congress enacted the RFPA in part as a response to Miller, 425 U.S. 435. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9306; see also United States v. Mann, 829 F.2d 849, 851 (9th

Cir. 1987); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). However, the "most salient feature of the Act is the narrow scope of the entitlements it creates", because congress wanted to "minimize[] the risk that customers' objections to subpoenas will delay or frustrate agency investigations." Jerry T. O'Brien, Inc., 467 U.S. at 745-46.

If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the financial institution's "customer" simultaneous notice of the access. see 12 U.S.C. § 3405(2) (administrative subpoena and summons); 12 U.S.C. § 3406(b) (search warrant); 12 U.S.C. § 3407(2) (Judicial subpoena); 12 U.S.C. § 3408(4)(A) (formal written request). In this case,

however, the DEA's subpoenas "for all financial records" of "any and all accounts related to" the claimants explicitly instructed the intermediary banks not to disclose the existence of their requests.

The Barranquilla Claimants contend that since they were not given notice of the government's access to the financial records, the evidence obtained from the subpoenas should have been suppressed at trial. The Atlantico Claimants argue that Judge Weinstein improperly dismissed their counterclaim alleging that the government and the intermediary banks were liable under the RFPA for disclosing information about the EFTs.

In response to both arguments, the government maintains that the claimants are not protected by the RFPA, because

they are not "customers" of the intermediary banks. Under the RFPA, a "customer" is "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution * * * in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). Thus, the act is limited to individual customers and small partnerships; corporations are not protected. see, e.g., Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985); Spa Flying Service, Inc. v. United States, 724 F.2d 95 (8th Cir. 1984) (per curiam); see also Jerry T. O'Brien, Inc., 467 U.S. at 745 (RFPA "carefully

limits the kinds of customers to whom it applies").

The government notes that the claimants are all corporations and therefore are not protected by the RFPA. It is unclear from the record on appeal whether the claimants are partnerships or corporations. If they are corporations, as they alleged in the district court, then they are not protected by the RFPA. If they are partnerships, as they now claim on appeal, we would need to remand so that the district court could obtain proof to that effect; however, a remand is not necessary, because there are alternate grounds that preclude the application of the RFPA.

Even if the claimants are in fact small partnerships rather than corporations, the government contends that they

still would not be protected by the RFPA, because they do not hold accounts in their names at the banks as required by 12 U.S.C. § 3401(5). The funds were not seized from accounts held in the various claimants' names, but were the proceeds of wire transfers that were designated to be credited to the accounts of Colombian banks maintained at the intermediary banks.

In response, claimants argue that once the EFTs were intercepted by the intermediary banks, the frozen funds were held by those banks under the claimants' names. At that point, claimants contend, they had "accounts" in their names at the banks. While claimants present a creative interpretation of an "account", the seized funds were being held by the banks until the forfeiture

trial at the request of the government, not the claimants. The RFPA is meant to protect those who maintain accounts in their names at financial institutions. Duncan, 813 F.2d at 1338 (definition of customer turns on "whether the individual maintains the financial account in his or her name only"); Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex, 1988). Because the funds were being held in custody at the banks pursuant to an arrest warrant, we conclude that the claimants never maintained accounts in their names at the intermediary banks.

Finally, the government contends that even if there had been a statutory violation of the RFPA, exclusion of the financial records from trial would not have been a permissible remedy. Because

the RFPA states that civil penalties are "the only authorized" remedy for its violation, see 12 U.S.C. § 3417(d), it would be inappropriate for the courts to imply a suppression remedy as well. United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir.) (only remedy under RFPA is provided in statute), cert. denied, 479 U.S. 844 (1986); see also United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) (courts should not imply a suppression remedy unless statute specifically refers to exclusionary rule), cert. denied, 112 S. Ct. 975 (1992).

In short on this point, because the RFPA does not protect the claimants, the Atlantico Claimants' counterclaim was properly dismissed, and the financial records were properly admitted at trial.

5. Authorization for DEA Subpoenas.

The Barranquilla Claimants also claim that the financial records should have been suppressed at trial because the DEA did not follow proper administrative procedures for issuing the subpoenas. Specifically, they argue that John Maltz, whose rubberstamped signature is on the subpoenas, did not have the authority to issue the subpoenas, and that even if he did, he failed to personally determine whether the subpoenas were "relevant or material" to investigations conducted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as required by 21 U.S.C. § 876 (a). See United States v. Hossbach, 518 F. Supp. 759, 765-66 (E.D. Pa. 1980).

Section 876 (a) authorizes the At-

torney General to issue subpoenas for "relevant or material" information; the Attorney General may in turn delegate this subpoenas power to any DEA officer or employee. See 21 U.S.C. § 878(a)(2); see also United States v. Mountain States Tel. & Tel. Co., 516 F. Supp. 225, 229 n.2 (D. Wyo. 1981). The relevant federal regulation authorizes, among others, all Special Agents-in-Charge and Assistant Special Agents-in-Charge to issue subpoenas. 28 C.F.R. § 0.104, App. to Subpart R, Sec. 4(a).

Maltz was the Associate Special Agent-in-Charge of the New York Drug Enforcement Task Force, a position not specifically included in the regulation's list. The Barranquilla claimants argue that any subpoena issued by Maltz was therefore unauthorized. As an Asso-

ciate Special Agent-in-Charge, however, Maltz supervises nine Assistant Special Agents-in-Charge, agents who are specifically authorized to issue subpoenas under the regulation. During Maltz's eight years as an Associate Special Agent-in-Charge, internal New York Drug Enforcement Task Force procedures have required all administrative subpoenas to bear his signature. Since Maltz has the same authority as an Assistant Special Agent-in-Charge, plus additional supervisory responsibilities, we agree with Judge Weinstein that Maltz's exercise of the subpoenas power was proper. See Hossbach, 518 F. Supp. at 765-66 (upholding validity of subpoenas issued by either agents-in-charge or acting agents-in-charge).

The Barranquilla Claimants further

argue that Maltz never "issued" the subpoenas because they simply bear his rubber-stamped signature; nor is there any indication that Maltz personally determined that the information sought was "relevant or material" to an investigation. Judge Weinstein called the DEA's procedures in this respect "dangerous" and recommended that the government review its system for issuing DEA administrative subpoenas, but he denied the claimants' motion to suppress. We find no error in his ruling. Nothing in the statute, regulations, or caselaw requires a handwritten, rather than a rubber-stamped, signature on the subpoena. More significantly, even if the initial subpoenas were defective, the financial records at issue would have been introduced at trial anyway, because

they were procured through other means as well. Both the government and the claimants served the intermediary banks with deposition and trial subpoenas for the same documents.

6. Electronic Communications Privacy Act.

Claimants argue that the EFTs were protected under the Electronic Communications Privacy Act of 1986 ("ECPA"), which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often called the wiretap act. 18 U.S.C. §§ 2510-20. The ECPA updated the wiretap act to add prohibitions against the interception of "electronic communications" to the already existing prohibitions against interceptions of oral and wire communications. See 18 U.S.C. § 2510(12). The Barranquilla Claimants

maintain that the district court should have suppressed evidence of the EFTs since they were seized in violation of the ECPA. The Atlantico Claimants contend that the complaint should have been dismissed because the in rem warrants did not satisfy the ECPA, and that for the same reason the district court erred in dismissing their counterclaim under the ECPA.

First, we must determine whether the ECPA is applicable to this case. The statute is directed at regulating surveillance activities. However, the ECPA's legislative history indicates that congress intended to protect "funds transfers among financial institutions". S. Rep. No. 99-541, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3562. There are no cases that

apply the ECPA to an electronic funds transfer between banks or to a seizure of funds after the transfer is complete. For purposes of this appeal, however, we assume that the ECPA may apply to EFTs. Before considering the statute's applicability to these transfers, we first take up other issues raised by the district court.

Judge Weinstein addressed the ECPA at length in Consolidated Bank Cases, 792 F. Supp at 190-93, and briefly in All Funds, 801 F. Supp. at 995-96. Relying on the "relation-back" doctrine, see 18 U.S.C. § 981(b); 21 U.S.C. § 881(h), he held that the ECPA was inapplicable because "in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed." All Funds, 801 F. Supp.

at 995-96. Because ownership was transferred instantly at the moment of criminality, he found that the government "reasonably viewed the funds as its own" at the time of seizure. Id. at 996 (quoting Consolidated Bank Cases, 792 F. Supp. at 192).

However, since Judge Weinstein's decision, the Supreme Court has clarified the parameters of the relation-back doctrine in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). There, the government initiated a civil forfeiture proceeding against land allegedly purchased with proceeds of illegal drug trafficking. The claimant, who had purchased the land with money her friend had given to her, maintained that she was an innocent owner because she did not know the money was traceable to

narcotics transactions. The district court held that, under the relation-back doctrine, title to the land vested in the government at the moment the illegal drug transaction proceeds were used to pay the purchase price. Therefore, because the claimant had purchased the land after the acts giving rise to the forfeiture had occurred, she had never owned the land.

The Supreme Court disagreed, holding that the government could not "profit from the common-law doctrine of relation-back until it has obtained a judgment of forfeiture." Id. at 1137. Otherwise, it would be impossible to launch an innocent-owner defense, which was specifically provided for at 21 U.S.C. § 881(a)(7). The relation-back doctrine is one of "retroactive

vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation." Id. at 1138 (Scalia, J., concurring).

In light of Buena Vista, Judge Weinstein's application of the relation-back doctrine was incorrect. Because the government cannot contend that it owns the defendant properties until a judgment of forfeiture is entered against them, we must examine the ECPA's applicability to the EFTs.

The ECPA prohibits interceptions of electronic communications, see 18 U.S.C. § 2511(1), but no "device" was used to obtain the information as contemplated by the ECPA. The statute defines "intercept" as

> the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any

> electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (emphasis added). Liability under the ECPA is therefore predicated on the use of a "device". See United States v. Turk, 526 F.2d 654, 658 (5th Cir.) (act requires "contemporaneous acquisition of the communication through the use of the device"), cert. denied, 429 U.S. 823 (1976). Because the government did not use any type of "device" to obtain the EFTs and information, no "interception" occurred.

The district court, therefore properly rejected all of the claimants' arguments under the ECPA.

7. Wire Transfer as a Res.

Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications.

They claim that an EFT is not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable res.

Section 881 of Title 21 provides for the seizure of "moneys, negotiable instruments, securities, or other things of value * * * all proceeds traceable" to narcotics transactions. 21 U.S.C. § 881(6). Similarly, 18 U.S.C. § 981(a)(1)(A) provides for the seizure of

"any property, real or personal, involved in a transaction or attempted transaction * * * or any property traceable to such property."

The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds

moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Our decision in United States v. Banco Cafetero Panama made it cleat that a bank credit is a seizable res. 797 F.2d 1154, 1158 (2d Cir. 1986) (bank credit is "clearly 'traceable proceeds' under the forfeiture statute") (Banco Cafetero). We also held that moving "traceable proceeds" from bank to bank would not insulate them from forfeiture.

"Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank." Id. at 1161; see also Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522 ("proceeds * * * involved in intervening legitimate transactions, or otherwise changed in form * * * still * * * subject to forfeiture" as long as "traceable connection to an illegal transaction in controlled substances exist[s]").

Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res

under the forfeiture statutes.

B. Probable Cause.

Unless a claimant challenges the validity of the seizure, as in a motion to suppress, the government is not called upon to demonstrate probable cause until trial of the forfeiture action, see $37,780 in United States Currency, 920 F.2d at 163 (applying Banco Cafetero, 797 F.2d at 1162), or perhaps on a summary judgment motion. Although the government succeeded in two pretrial probable-cause hearings, one before Magistrate Judge Chrein and one before Judge Weinstein, and in a full-blown jury trial, claimants still contend that the government failed to meet its burden of proving probable cause. Both for seizures made under in rem warrants and for warrantless seizures

under § 881, the government bears the initial burden of establishing probable cause for instituting the forfeiture proceeding, see 21 U.S.C. § 881(d) (incorporating customs procedures); 19 U.S.C. § 1615 (customs laws), that is, "probable cause to believe that the properties are the fruits of illegal drug activity". See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 811-12 (2d Cir. 1990) (Whites Hill), cert. denied, 498 U.S. 1091 (1991).

Since 1986 our caselaw has consistently relied on Banco Cafetero for the proposition that, to establish probable cause, the government must have "reasonable grounds" to believe the property is subject to forfeiture, and that these grounds must rise above the level of

"mere suspicion". 797 F.2d at 1160. See, e.g., United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990) (Black Ledge Drive); Livonia Rd., 889 F.2d at 1267; United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988) (per curiam). However, we seem to have recently articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993) (citation omitted), we stated that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled substance'", in St. Nicholas Ave., 983 F.2d at 403, we said that "[t]here need

not be a substantial connection between the drug activities and the property in question, but only a nexus between them." We therefore take this opportunity to resolve this apparent contradiction.

As authority for the "substantial connection" standard, the $31,990 in U.S. Currency decision quotes United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir.), cert. denied, 495 U.S. 958 (1990), which in turn relies on Banco Cafetero, 797 F.2d at 1160. However, Banco Cafetero does not state that a "substantial connection" must be shown, only that the government must have "probable cause to connect the property with narcotics activity". 797 F.2d at 1160 (emphasis added).

Moreover, on several occasions we have specifically declined to adopt a "substantial connection" standard. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir.) (Whalers Cove), cert. denied, 113 S. Ct. 55 (1992); Livonia Rd., 889 F.2d at 1269; United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977). Our decisions in $31,990 in U.S. Currency, 982 F.2d 851, and United States Currency in the Amount of $228,536.00, 895 F.2d 908, are the only second circuit cases to the contrary. Examining the facts of those two cases, we note that application of the lower "nexus" standard, rather than the "substantial connection" standard, would not have affected their results.

In $31,990 in U.S. Currency, the

government failed to establish probable cause to forfeit money seized from the trunk of a cab. 982 F.2d at 854-56. The claimant, who had been a cab fare they day before the seizure, said he had inadvertently left his money in the cab. The government's evidence consisted of the large amount of cash seized, the manner in which it was packaged, the cab driver's story regarding who owned the money, parallels between the cab's itinerary and that of a drug courier, and the cab driver's possession of half a gram of cocaine. Id. at 853-55. None of the people involved had ever been linked to any criminal activity. Not only did the government fail to show a "substantial connection" between the claimant's property and narcotics, we held that the evidence demonstrated "no

more than a suspicion" that the money was the proceeds of drug trafficking. Id. at 856. It goes without saying that evidence failing to amount to more than "mere suspicion" is incapable of establishing a "nexus".

In United States Currency in the Amount of $228,536.00, the evidence supporting probable cause included tape recordings of numerous conversations implicating the claimant in drug trafficking, tax records, and eyewitness testimony detailing the claimant's possession, processing, and sales of large amounts of cocaine. 895 F.2d at 911. Application of the "nexus" standard there would have had no effect, since the government's case satisfied the higher "substantial connection" standard.

Under all these circumstances, we are satisfied that the weight of authority in the second circuit indicates that the government must demonstrate only a "nexus between the seized property and illegal drug activity, not a "substantial connection". See St. Nicholas Ave., 983 F.2d at 403; United States v. One 1987 Jeep, 972 F.2d 472, 476 (2d Cir. 1992); Whalers Cove, 954 F.2d at 33; United States v. One 1974 Cadillac, 575 F.2d 344, 345 (2d Cir. 1978) (per curiam); One 1974 Cadillac Eldorado Sedan, 548 F.2d at 423.

To show that nexus when the res is a bank account, the government must establish that there is probable cause to believe the funds represent proceeds traceable to drug transactions, see St. Nicholas Ave., 983 F.2d at 403; it is

not required to link the monies to any one particular transaction. See Livonia Rd., 889 F.2d at 1269 (citing Banco Cafetero, 797 F.2d at 1160). The government must establish "reasonable grounds", based on more than "mere suspicion", that the funds are subject to forfeiture. Banco Cafetero, 797 F.2d at 1160; Livonia Rd., 889 F.2d at 1267. Curiously, this standard of proof can be less stringent than the typical "prima facie proof". Banco Cafetero, 797 F.2d at 1160. A finding of probable cause may be based on hearsay, even hearsay from confidential informants, see Livonia Rd., 889 F.2d at 1267, or circumstantial evidence, see St. Nicholas Ave, 983 F.2d at 405, particularly in cases involving bank accounts, money, or other fungible assets. See id. ("only proof

demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking").

Claimants argue that the evidence presented here was illegally seized and therefore provided an impermissible basis for a finding of probable cause. As discussed above, however, there is no basis for suppressing the evidence derived from the seizures under either the fourth amendment or federal statutes.

The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on

information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress.

Claimants also assert that even if the evidence was properly admitted at trial, the government failed to demonstrate "reasonable grounds" for the forfeiture of their funds. Under 21 U.S.C. § 881, probable-cause determinations are "made by the trial court's exercise of its judgment in light of all the circum-

stances." St. Nicholas Ave., 983 F.2d at 405. The government's case included bank records from around the world; documents seized by the Colombian National Police from Cali, Colombia; and testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records.

While the claimants argue that the government failed to submit evidence that the "sources" and "destinations" of the seized funds were connected to narcotics activities, the extensive evidence regarding the Santacruz-Londono organization as a whole was more than

sufficient to link the defendant funds to illegal drug trafficking. Each one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness. We hold that the district court properly determined that the government had met its burden of establishing probable cause for the forfeitures.

C. Shifting Evidentiary Burden.

After the government has established probable cause, the burden shifts to the claimant to "demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause have not been met or to show claimant[']s lack of knowledge or consent to drug related activities." St. Nicholas Ave., 983 F.2d at 403; see Black Ledge Drive, 897 F.2d at 102;

Livonia Rd., 889 F.2d at 1267 ("claimant must prove either that the property was not used unlawfully * * * or that the illegal use was without the claimant's knowledge or consent"); Banco Cafetero, 797 F.2d at 1160 (claimant bears "ultimate burden"). if the res is a bank account, the claimant bears the burden of proving that the account does not contain proceeds traceable to drug transactions, but rather represents legitimate funds. St. Nicholas Ave., 983 F.2d at 403.

Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for forfeiture, need only demonstrate "reasonable grounds", the owner of the

seized property must prove that the defendant property is legitimate "by a preponderance of the evidence", a more stringent standard. United States v. 303 W. 116th St., 901 F.2d 288, 291 (2d Cir. 1990).

Judge Weinstein observed that the structure of the civil forfeiture statutes is "inherently unfair to claimants". All Funds, 801 F. Supp. at 991. While we also might question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property id "guilty", the constitutionality of congress's allocation of the burdens of proof in forfeiture cases has been upheld. See Whites Hill Road, 916 F.2d at 814. We therefore stress the need for courts to en-

sure that what little due process is provided for in the statutory scheme is preserved in practice. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal- Civil Law Distinction, 42 Hastings L. Rev. 1325 (1991) (urging attention to civil law due process implications of current forfeiture practices); See also United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

As the jury's verdict indicates,

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. successfully proved that their monies were not connected to drug activity. In addition, the jury found that Confecciones Elizabeth was and innocent owner. The remaining claimants were unable to show by a preponderance of the evidence that their monies were legitimate. Given that "the evidence of drug tainting was overwhelming" and that the claimants presented "implausible stories" and "inconsistent positions", see All funds, 801 F. Supp. at 992, we find that the remaining eighteen amounts were properly forfeited.

D. Other District Court Rulings.

1. Sanctioning Counsel.

During discovery, the Barranquilla claimants requested admissions from the government regarding numerous histori-

cal, social, and cultural aspects of Colombia. Because Chief Magistrate Judge Chrein questioned the relevance of these requests and felt they were frivolous, he directed both parties to brief the issue of appropriate sanctions for Barranquilla Claimants' Counsel after the trial. No sanctions were imposed during trial, and ultimately Judge Weinstein denied the government's post-trial motion for sanctions.

On appeal, the Barranquilla Claimants assert that their counsel was "chilled" during the trial by the threat of possible sanctions in violation of their due process rights. The record, however, reveals no evidence that counsel for the Barranquilla Claimants was "chilled" in any way. In the absence of prejudice to the Barranquilla Claimants

from Chief Magistrate Judge Chrein's actions, we find no violation of their due process rights.

2. Permitting Expert-Witness Testimony.

The Barranquilla Claimants claim that they were prejudiced by DEA Agent Michaelis's testimony on the subject of money laundering, because it constituted surprise expert testimony. Michaelis was listed on the government's witness list prior to trial, but not as an expert. When Michaelis took the stand, Judge Weinstein qualified him as an expert and allowed him to testify about Santacruz-Londono's overall money-laundering scheme and techniques. The Barranquilla Claimants argue that they were "substantially prejudiced" by this unexpected expert testimony.

Under the Federal Rules of Evidence, expert Witnesses may testify if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Qualified DEA agents who testify as fact witnesses may also give expert opinion testimony about the methods of drug operations. See United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 498 U.S. 866 (1990); United States v. Diaz, 878 F.2d 608, 617 (2d Cir.), cert. denied. 493 U.S. 993 (1989). A decision to allow expert testimony is within the broad discretion of the trial judge and "is to be sustained on appeal unless manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985), cert. denied, 475 U.S. 1141

(1986) (citation omitted). Furthermore, a district court's decision to permit a witness who was not listed in the pre-trial order to testify will be upheld absent a clear abuse of discretion. Dunlap- McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992).

A district court judge must frequently make close discretionary calls regarding the admission of evidence in civil forfeiture proceedings. Indeed, the Supreme Court has recently signalled its willingness, at least with respect to expert testimony, to require more active supervision by the district court. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-98 (1993). Because in civil forfeiture proceedings the government is far more favored by the rules than in

virtually any other type of judicial proceeding, we think district judges, when making evidentiary decisions in these cases, should be mindful of the heavy burden placed on claimants.

Agent Michaelis's testimony included an account of his investigation of Santacruz-Londono and his associates, as well as opinions about their money-laundering activities. Judge Weinstein's determination that his testimony would help the jury was neither "manifestly erroneous" nor a "clear abuse of discretion". Especially in light of the jury instructions explaining that the government had not given Michaelis's expert testimony in writing to opposing counsel when they should have, and that an expert's opinion should not be substituted for the jury's own conclusions, we con-

clude that the claimants were not prejudiced by Agent Michaelis's testimony.

3. Denial of Motion for Judgement Notwithstanding the Verdict.

At the end of the trial, Judge Weinstein denied the Atlantico Claimant's motion for a judgement notwithstanding the verdict. See Fed. R. Civ. P. 50(b). On appeal, the Atlantico Claimant's contend that the district court erred in denying their motion, because the government presented no evidence connecting their funds with narcotics activity.

We review the district court's decision on a motion for judgement notwithstanding the verdict de novo. Song v. Ives Laboratories, 957 F.2d 1041, 1046 (2d Cir. 1992). Therefore, we can disturb the jury's verdict only if we

can say, "without considering either the credibility of witnesses or the weight their testimony deserves, that the only conclusion a reasonable factfinder could have reached" is one favoring the Atlantico Claimants. Enercomp, Inc. v. McCorhill Publishing, Inc., 873 F.2d 536, 541 (2d Cir. 1989). In other words, there must be "`such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or * * * such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" Song, 957 F.2d at 1046.

Given the overwhelming evidence linking the Atlantico Claimants to drug trafficking and money laundering, the

district court properly denied their motion for judgement notwithstanding the verdict.

D. Internal Revenue Service Levy.

On July 29, 1992, the IRS served a notice of Levy on the clerk of the United States District Court for the Southern District of New York to surrender the funds that were about to be released to Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. The IRS asserted that these two claimants were "nominees or alter egos" of Johnny Daccarett, a delinquent taxpayer who owed the IRS in excess of $3 million. Because Judge Weinstein's judgment, dated August 5, 1992, directed the clerk to issue a check for those funds to counsel for the Atlantico Claimants, the clerk requested clarification from the court. At that

point the government moved to amend the judgement to direct the clerk to honor the IRS levy. Instead of amending the judgement, Judge Weinstein simply entered an order authorizing the clerk of the court to comply with the levy -- which he did, on September 9, 1992.

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. claim that Judge Weinstein erred in permitting execution of the IRS levy because (1) the government failed to show that it was issued in accordance with 26 U.S.C. § 7429(a); (2) the Anti-Injunctive Act prevents it, 26 U.S.C. § 7421; (3) Johnny Daccarett has no proprietary interest in their businesses; and (4) the government was circumventing the federal interpleader statute and the Federal Rules of Civil Procedure.

In response, the government argues that the only grounds for noncompliance with an IRS levy are that (1) the entity served with the levy is neither "in possession of" nor "obligated with respect to" the requested property, or (2) the taxpayer's property is "subject to an attachment or execution under any judicial process." 26 U.S.C. § 6332. Since the validity of the levy and competing claims to the ownership of the funds are not valid reasons for refusing to honor a levy, the court properly directed the clerk to honor the IRS's levy.

If Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. want to pursue their challenge the IRS claim, they must bring a separate wrongful levy action. 26 U.S.C. § 7426.

CONCLUSION

As the use of civil forfeiture against the proceeds of narcotics trafficking increases, it is important to remember that the pertinent statutes are not legislated exceptions to the fourth amendment. Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light of the fifth amendment's due process demands and the fourth amendment's probable-cause and warrant requirements. Having done so in this case, we conclude that the government carefully complied with both its statutory and constitutional obligations.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October, one thousand nine hundred and ninety-three.

Present: HON. JAMES L. OAKES,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPERESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No.

044000804961700114433 held at The MERRILL LYNCH BANK 1 Columbus ; PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO OCAMPO; ANA MILENA SANTACRUZ; RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA.; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTD.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC., BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTENA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLUMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS. LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LIMITADA; MANUFACTURAS DE MODAS LTDA; INCOLO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants.

EMPERESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-claimants.

Petitions for rehearing having been filed herein by Defendants-Appellants, Abuchaibe Hnos. Ltda, Manufacturas Internacionales Ltda, Organizacion J.D. Ltda, Manufacturas JD Ltda, Comercial Samora Ltda, Creaciones Viviana Ltda, Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Manufacturera del Atlantico Ltda, Industrias Marathon Limitada, Manufacturas de Modas Ltda, Incolco Ltda, Creaciones Karen, Tote Export Manufacturas Ltda, Creaciones Ivonne, Confecciones Zuny and Valery Fashions,

Upon consideration by the panel thereof, it is

Ordered that said petitions be and it hereby are DENIED.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

By:

/s/ Carolyn Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

Nos. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073

Supreme Court, U.S.
FILED
FEB 18 1994
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ABUCHAIBE HNOS. LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

COMERCIAL SAMORA LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ORGANIZACION JD LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

INDUSTRIAS MARATHON LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MANUFACTURERA DEL ATLANTICO LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
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QUESTIONS PRESENTED

1. Whether evidence of electronic fund transfers through banks in New York City should have been suppressed on the ground that they were unlawfully intercepted within the meaning of 18 U.S.C. 2510(4), and whether petitioners were entitled to damages for disclosure of those transfers.

2. Whether petitioners' counterclaims for damages under the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, were properly denied because petitioners never held accounts in their names at the intermediary New York banks.

3. Whether the *in rem* forfeiture complaints in this case were sufficiently particularized (Nos. 93-1002, 93-1018, 93-1019, 93-1061, and 93-1073).

4. Whether the district court abused its discretion in holding a joint trial, and whether there was sufficient evidence to justify the forfeiture verdict (Nos. 93-1002, 93-1018, 93-1019, 93-1061, and 93-1073).

5. Whether the forfeitures of petitioners' funds constituted excessive fines under the Eighth Amendment (Nos. 93-1002, 93-1018, 93-1061, and 93-1073).

6. Whether the court of appeals correctly determined that petitioners could challenge an IRS levy only by bringing a separate wrongful levy action under 26 U.S.C. 7426 (No. 93-1020).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 93-1002

CREACIONES VIVIANA LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 93-1018

ABUCHAIBE HNOS. LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 93-1019

COMERCIAL SAMORA LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 93-1020

ORGANIZACION JD LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 93-1061

INDUSTRIAS MARATHON LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 93-1073

MANUFACTURERA DEL ATLANTICO LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-100b)[1] is reported at 6 F.3d 37. The opinion of the district court (Pet. App. 1a-76a) is reported at 801 F.Supp. 984. A related opinion of the district court in a civil suit by peti-

[1] All citations to the appendix to the petition are to the appendix in No. 93-1002, unless otherwise indicated.

tioners against certain banks (93-1018 Pet. App. 1d-77d) is reported at 792 F.Supp. 180.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993. A petition for rehearing was denied on October 6, 1993. Pet. App. 1c-4c. The petition for a writ of certiorari in No. 93-1002 was filed on December 20, 1993; in No. 93-1018 on December 27, 1993; in No. 93-1019 on December 23, 1993; in No. 93-1020 on November 15, 1993; in No. 93-1061 on December 28, 1993; and in No. 93-1073 on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1990, the government filed a civil forfeiture action under 18 U.S.C. 981 and 21 U.S.C. 881 seeking forfeiture of approximately $12 million that was alleged to be narcotics proceeds being laundered through various bank accounts. Petitioners filed claims to the funds, asserting that they were the proceeds of legal commercial activities. After a jury trial in the United States District Court for the Eastern District of New York, the jury returned a verdict forfeiting approximately $10 million to the government.[2] The district court also dismissed petitioners' action against the Assistant United States Attorneys and Drug Enforcement Administration (DEA) agents involved in this case, as well as the coun-

[2] Petitioner Comercial Samora Ltda. withdrew its claim to the funds prior to trial. Consequently, the district court entered a separate judgment against Commercial Samora Ltda. Pet. App. 19b-20b. The jury found that funds claimed by petitioners Organizacion JD Ltda. and Manufacturas JD Ltda. were not traceable to illegal transactions. However, after judgment, the IRS served a levy against those funds on the clerk of the district court. *Id.* at 18b, 97b-98b.

terclaims of all petitioners for violations of the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510-2521, and the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* The court of appeals affirmed. Pet. App. 1b-100b.

1. The forfeitures arose out of an effort to impede the money laundering activities of the Cali, Colombia, drug cartel, headed by Jose Santacruz-Londono. The Cali cartel is responsible for importing some 3,000 kilograms of cocaine per month into this country. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its drug proceeds. It moves its funds through the banks by various means, including electronic funds transfers (EFTs) for eventual deposit into Colombian bank accounts. Pet. App. 8b-9b.

An EFT is begun when a customer's bank sends a message to the transfer system's central computer that states the amount of money to be transferred, the identity of the sending and receiving banks, and the identity of the intended beneficiary. The central computer adjusts the account balances of the sending and receiving banks and generates a debit ticket at the sending bank and a credit ticket at the receiving bank. The receiving bank also notifies the beneficiary of the transfer. If the sending bank and receiving bank are not directly connected to the same network, the transfer must go through one or more intermediary banks. Each of them receives a credit for its own account when it receives the EFT and then a debit when it sends the EFT to the next bank in line. International transactions often require a series of such transfers through one or more intermediary banks. A series of such transfers can occur extremely quickly. Pet. App. 9b-10b.

The seizures at issue in this case stemmed from the arrests in Luxembourg on June 28 and 29, 1990, of three associates of Santacruz-Londono. The three men had opened hundreds of bank accounts in Europe and had deposited large sums of money in the accounts for the Cali cartel. Fearing that the arrests would cause the cartel to move its funds to Colombia before they could be confiscated, Luxembourg law enforcement authorities requested several countries, including the United States, to freeze the cartel's funds. During July and August 1990, there was a flurry of EFTs from the accounts. Authorities seized $30 million in Europe, $16 million in Panama, and $12 million in this country. Pet. App. 11b; *id.* at 10a-12a.

The funds seized in the United States came from certain bank accounts, as well as dozens of EFTs sent through intermediary New York City banks—Banco Atlantico, Manufacturers Hanover, and The Bank of New York—that had correspondent banking relationships with Panamanian and Colombian banks. After receiving the EFTs, the intermediary New York banks were to credit the accounts of designated correspondent Colombian banks, and the Colombian banks were then to credit the accounts of their customers, the ultimate beneficiaries. Through oral orders and a series of eight *in rem* arrest warrants, federal agents instructed the intermediary New York banks to attach all funds on deposit in the names of various individuals and entities associated with Santacruz-Londono, as well as to inform the agents about all transfers that appeared to be destined for a related third-party beneficiary in Colombia. The New York banks complied with the agents' directions. As a result of the information supplied by the banks, the successive *in rem* complaints each included additional names. Pet. App. 12b-13b.

2. Petitioners and seven other claimants, all purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to some $6.5 million of the seized funds, denied the allegations of the forfeiture complaint, and asserted that the monies had been derived from legitimate clothing sales. Petitioners also brought two counterclaims that sought damages for violations of the Fourth and Fifth Amendments, the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510-2521 and 2701-2710, the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401-3422, the Federal Tort Claims Act, 28 U.S.C. 2671-2680, and the forfeiture statutes. The district court dismissed the counterclaims prior to trial. Pet. App. 14b-15b.

Petitioners also sued the intermediary banks for loss of the use of their funds and violations of various statutes. The district court granted summary judgment in favor of the banks, holding that they could not be held liable for following government orders concerning claimed government funds. Pet. App. 15b-16b; 93-1018 Pet. App. 33d-77d. Petitioners also sued the Assistant United States Attorneys and DEA agents involved in this case, who had directed the banks to seize the funds. The district court dismissed that action for failure to state a claim. Pet. App. 16b.

The district court found that there was probable cause to seize the funds. The court also denied petitioners' motions to suppress evidence. Pet. App. 16b-17b. Corporate and banking records introduced at trial, as well as testimony of witnesses familiar with the Cali cartel, linked the seized funds to Santacruz-Londono's drug proceeds and to various Panamanian and Colombian shell corporations. The jury found that 18 of the 22 seized funds were forfeitable, but that the funds claimed by petitioners Manufacturas JD Ltda. and Organizacion JD Ltda. were

not traceable proceeds of money laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. *Id.* at 17b-18b.

3. On appeal, the court of appeals affirmed the district court's rulings in all respects. The court of appeals observed that the government can proceed in three ways to seize property subject to forfeiture under 21 U.S.C. 881. First, the government can follow the process in the Supplemental Rules for Certain Admiralty and Maritime Claims (Supp. R.). Second, the government can obtain a seizure warrant under Fed. R. Crim. P. 41(c). Finally, the government can seize the property under 21 U.S.C. 881(b)(4) without judicial process when the Attorney General has probable cause to believe the property is subject to forfeiture. Pet. App. 24b-25b.

The court held that the seizures of at least nine of the EFTs "followed the process prescribed by the Supplemental Rules." Pet. App. 27b. The court held that the *in rem* complaints were sufficiently particularized, under Supp. R. C(2) and E(2). Pet. App. 31b-36b. According to the court, because the complaints named the intermediary banks through which the funds were to be transferred, as well as the intended beneficiaries of the transfers, the complaints described the subject property with requisite particularity. *Id.* at 34b-35b. The court likewise found that the seizures of 11 fund amounts without warrants were proper under 21 U.S.C. 881(b)(4), because the government had probable cause to believe that the EFTs were subject to civil forfeiture. Pet. App. 36b-38b.

With respect to petitioners' Fourth Amendment claims, the court of appeals held that exigent circumstances justified the warrantless seizures (Pet. App. 39b-42b), and that there was probable cause to bring the forfeiture complaints. *Id.* at 42b-46b. The court of appeals likewise held that petitioners had no privacy interest in

the intermediary banks' financial records. *Id.* at 47b-50b. The court first reasoned that petitioners' relationship with the intermediary banks was too remote to allow petitioners to claim any expectation of privacy in information about the EFTs. *Id.* at 47b. Even if petitioners had had their own accounts with the intermediary banks, the court held, information concerning those accounts would not be protected by the Fourth Amendment, because the DEA was authorized to make inquiries of the banks, and the banks were authorized to turn over the information. Pet. App. 47b-50b, citing *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and *United States* v. *Miller*, 425 U.S. 435, 440, 445-446 (1976).

The court also rejected petitioners' claims under the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.* Although the DEA did not give notice to petitioners of the subpoenas to the intermediary banks, the court held that no notice was required under the statute, because petitioners did not hold accounts in their names at the banks, as required by 12 U.S.C. 3401(5). The court pointed out that the seized funds did not come from accounts held in any claimant's name, but rather were wire transfers to be credited to the accounts of Colombian banks that were maintained at the intermediary banks. Petitioners never maintained accounts in their names at the intermediary banks. Pet. App. 55b-56b. The court also agreed that, because the only authorized remedy for violations of the RFPA are civil penalties, petitioners would not be entitled to suppression of evidence even if the RFPA were violated. Pet. App. 56b-57b.

The court also rejected petitioners' claims that the *in rem* warrants did not satisfy the Electronic Communications Privacy Act of 1956 (ECPA), Pub. L. No. 99-508, § 105(b), 100 Stat. 1856, which added "electronic communications" to the coverage of the wiretap statute, 18

U.S.C. 2510-2521.[3] The court concluded that the ECPA prohibits interceptions of electronic communications through the use of a device. Since the government did not use any kind of "device" to obtain the EFTs here, no interception occurred within the meaning of the statute. Pet. App. 67b-68b.

In addition, the court held that the government had established that there was probable cause to believe that the funds represented proceeds traceable to drug transactions. The court ruled that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking," and "[e]ach one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness." Pet. App. 84b-85b. In so ruling, the court adhered to its own established precedent that the government was not required to "link the monies to any one particular transaction." *Id.* at 80b-81b. The court of appeals also affirmed the district court's denial of petitioners' motion for judgment notwithstanding the verdict. The court of appeals concluded that there was "overwhelming evidence" linking petitioners to drug trafficking and money laundering. *Id.* at 96b.

Finally, the court of appeals held that Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. could not challenge in this case the post-trial IRS levy on their funds. The IRS had levied against their funds on the ground that they were nominees or alter egos of Johnny Daccarett, a delinquent taxpayer who owed the government $3 million. The court held that petitioners had to file a

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[3] The court noted that "[t]he statute is directed at regulating surveillance activities," Pet. App. 63b, but assumed arguendo it also applied to EFTs. *Id.* at 63b-64b.

separate wrongful levy action under 26 U.S.C. 7426 if they wanted to challenge the levy. Pet. App. 97b-99b.[4]

ARGUMENT

1. Petitioners contend (93-1002 Pet. 22-35; 93-1018 Pet. 21-33; 93-1019 Pet. 19-31; 93-1020 Pet. 34-50; 93-1061 Pet. 21-33; 93-1073 Pet. 22-34) that the court of appeals erred in concluding that the EFT seizures did not violate the Electronic Communications Privacy Act amendments to the wiretap statute. They argue that the court erred in holding that no interception occurred. They also claim that the intermediary banks violated 18 U.S.C. 2703(a) by disclosing the EFT information to the government, and that as a result all evidence of the EFT transfers should have been suppressed and they should have been awarded damages for the violations.[5]

a. The wiretap statute, as modified by ECPA, prohibits certain interceptions of electronic communications. See 18 U.S.C. 2511(1). Under 18 U.S.C. 2510(12), an "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted * * * by a wire." The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or

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[4] The court of appeals rejected petitioners' other arguments, including that the EFTs did not qualify as a seizable *res*, and that petitioners satisfied their burden of proving that they were innocent owners of the funds. Petitioners do not renew those claims here.

[5] Petitioner Comercial Samora Ltda. withdrew its claims prior to trial, and therefore waived any complaints about the outcome of the trial. That includes its claims that the EFT seizures violated the ECPA, that the district court erred in denying their counterclaims for damages under the Right to Financial Privacy Act, and that the July 13, 1990, *in rem* warrant was a general warrant. Pet. App. 19b-20b.

oral communication *through the use of any electronic, mechanical, or other device.*" 18 U.S.C. 2510(4) (emphasis added). If no device is used to acquire the contents of a wire communication, the statute is not implicated. See *United States* v. *New York Tel. Co.*, 434 U.S. 159, 167 (1977). The court below therefore was correct in focusing on the question whether the government acquired the contents of any EFT through the use of an electronic, mechanical, or other device. See Pet. App. 67b-68b.[6]

Other courts of appeals have held that once a transmission is completed, the government's subsequent acquisition of the information contained in the transmission does not violate the statute, because no interception has occurred. See, *e.g.*, *United States* v. *Meriwether*, 917 F.2d 955, 959-960 (6th Cir. 1990) (acquisition of a telephone number from a telephone pager display after transmission was completed was proper because no interception took place); *United States* v. *Turk*, 526 F.2d 654, 658 (5th Cir.), cert. denied, 429 U.S. 823 (1976) (interception requires a contemporaneous acquisition of the communication through the use of a device). That interpretation is consistent with the legislative history of the ECPA, which explained that the pre-ECPA definition of "intercept" under Section 2510(4) "is retained" and is expanded only in that "it is illegal to intercept the

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[6] We doubt that petitioners were "aggrieved person[s]" who may move to suppress the contents of any wire communication intercepted under the wiretap statute. 18 U.S.C. 2518(10)(a). An "aggrieved person" is defined by Section 2510(11) as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." Petitioners were not parties to any of the EFTs in question; indeed, they denied at trial that they had ever received any documents from any United States bank. See Gov't C.A. Br. 65.

non-voice portion of a wire communication." S. Rep. No. 541, 99th Cong., 2d Sess. 13 (1986). The Senate Report further explained that "the crime of interception under the [ECPA] consists of the intentional acquisition of the contents of a wire, electronic or oral, communication through the use of any electronic, mechanical or other device." *Id.* at 24.

Here the government did not intercept the EFT transmissions while they occurred, but instead simply directed the intermediary banks not to credit the EFTs to the Colombian correspondent banks. In that process, the government did not use a device to acquire the contents of an electronic communication. Although the banks may have entered certain instructions into their computers in order to halt the incoming EFTs before they could be rerouted to the Colombian correspondent banks, that does not constitute an interception within the meaning of the statute, *i.e.*, the use of a device to acquire information conveyed in the communication. The court of appeals therefore correctly held that no interception occurred within the meaning of 18 U.S.C. 2510(4). Pet. App. 68b. Petitioners do not cite any decision of any other court to the contrary.[7]

[7] Petitioners also contend (93-1002 Pet. 48-50; 93-1018 Pet. 46-52; 93-1019 Pet. 33-35; 93-1020 Pet. 34-50; 93-1061 Pet. 47-53; 93-1073 Pet. 48-54) that they are entitled to damages because of the disclosure of the contents of the electronic communications. Since the government did not violate the ECPA in obtaining information about the EFTs, petitioners are not entitled to damages for violations of that statute. And in any event, petitioners would not be entitled to damages from the government, because 18 U.S.C. 2520(a), which creates a right to sue for damages, does not set out a cause of action against the United States. It therefore does not constitute a waiver of the government's sovereign immunity. See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (waivers of

b. Petitioners also argue (93-1002 Pet. 30; 93-1018 Pet. 28; 93-1019 Pet. 27; 93-1020 Pet. 41; 93-1061 Pet. 28; 93-1073 Pet. 29) that the banks violated 18 U.S.C. 2703 in turning over information about the EFTs to the government. Under 18 U.S.C. 2707 and 2708, the only remedy for a violation of Section 2703 is a civil action by a provider of electronic communications services.[8] Accordingly, suppression is not an available remedy for a violation of Section 2703. And petitioners—who were not themselves providers of electronic services—have no right to bring a civil action for damages under Section 2707.

2. Petitioners argue (93-1002 Pet. 51-53; 93-1018 Pet. 52-54; 93-1019 Pet. 31-33; 93-1020 Pet. 51-53; 93-1061 Pet. 53-55; 93-1073 Pet. 54-56) that the district court erred in denying their counterclaims for civil penalties under the Right to Financial Privacy Act of 1978, 12 U.S.C. 3417. That statute provides that "[a]ny agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable *to the customer* to whom such records relate" for specified civil penalties. 12 U.S.C. 3417(a) (emphasis added). The

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sovereign immunity "cannot be implied but must be unequivocally expressed").

[8] Section 2708 provides:

> The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

"This chapter" is Chapter 121, governing Stored Wire and Electronic Communications and Transactional Records Access. Section 2518, on the other hand, which does provide for a suppression remedy, is in Chapter 119. The only remedies under Chapter 121 are those in Section 2707, which provides for damages and for equitable relief as may be appropriate. See 18 U.S.C. 2707(b)(1).

courts below correctly determined, however, that petitioners were not "customers" of the intermediary banks within the meaning of 12 U.S.C. 3401, and therefore had no right to civil penalties.

The statute defines a customer as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, *in relation to an account maintained in the person's name.*" 12 U.S.C. 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. 3401(4). Relying on the plain language of the statute, the court of appeals noted that "[t]he RFPA is meant to protect those who maintain accounts in their names at financial institutions." Pet. App. 56b. Indeed, the definition of a customer under the RFPA turns on "whether the individual maintains the financial account in his or her name only." *Duncan* v. *Belcher*, 813 F.2d 1335, 1338 (4th Cir. 1987).

As the court of appeals recognized, even assuming petitioners were limited partnerships of five or fewer individuals and thus would otherwise qualify as "persons" under the statute, they did not hold any accounts in their names at the intermediary New York banks. Pet. App. 54b-56b. Those banks, which had no dealings with petitioners, simply held the funds pursuant to arrest warrants. Consequently, the courts below were correct in denying petitioners' counterclaims under the RFPA.

3. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico, Ltda., et al. argue (93-1002 Pet. 35-38; 93-1018 Pet. 33-37; 93-1019 Pet. 36-39; 93-1061 Pet. 34-37; 93-1073 Pet. 35-38) that the July 13, 1990, *in rem* warrant was a general warrant.

The forfeiture complaints alleged that Santacruz-Londono had caused substantial amounts of money that were proceeds of drug trafficking and money laundering to be transferred through the defendant accounts for ultimate credit to accounts of the various claimants. In addition, an international letter rogatory was incorporated by reference in the complaint. That letter rogatory described in greater detail the investigation of Santacruz-Londono, the arrests of three cartel members in Luxembourg, and the use of Panamanian and Colombian shell corporations to disguise the illegal nature of the proceeds. Pet. App. 33b-34b. Moreover, petitioners filed claims and responses to the seventh amended complaint without moving for a more definite statement. Pet. App. 35b. In those circumstances, the court of appeals correctly held that, because the *in rem* complaint described the intermediary banks through which the funds were transferred as well as the intended beneficiaries, the complaint described the subject property with sufficient particularity to enable petitioners to investigate the facts and frame a responsive pleading under Supplemental Rule E(2)(a). Pet. App. 34b-35b.[9]

4. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico Ltda. also argue (93-1002 Pet. 39-43; 93-1018 Pet. 37-41; 93-1061 Pet. 38-42; 93-1073 Pet. 39-43) that the district court abused its discretion in

[9] In addition, the court of appeals held that the government had probable cause for the warrantless seizures of 11 of the funds. Pet. App. 36b-38b. Section 881(b)(4) gives the Attorney General authority to seize property prior to filing a forfeiture complaint if the government has probable cause to believe that the property is forfeitable. Petitioners do not challenge the court of appeals' ruling in this regard. We note that forfeiture complaints were filed within days of the warrantless seizures. See Pet. App. 38b.

considering their claims along with those of the other claimants and in not tracing each EFT to a particular illegal drug transaction.

The district court did not abuse its discretion in holding a joint trial. Although petitioners claim that they were prejudiced by evidence introduced against other claimants, the jury was able to compartmentalize the evidence concerning each claimant. The jury found that sums attributed to two claimants were not drug proceeds and that a third claimant was an innocent owner. Consequently, petitioners were not prejudiced by the joint trial.

Moreover, further review of the factbound decision by both courts below to uphold the jury's forfeiture verdicts is not warranted. Both courts were satisfied that the evidence overwhelmingly showed that the sums claimed by petitioners were traceable to Santacruz-Londono's drug and money laundering enterprise. Pet. App. 84b-85b, 96b, 29a-35a. As the court of appeals noted, the evidence included not only documents from Colombia and other countries, but also the "testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records." Pet. App. 84b.[10] Nothing more was required.

[10] For example, the accountant had previously worked with garment manufacturers and testified as an expert witness. He and his staff reviewed more than 30,000 documents that the claimants had produced and concluded that the records indicated that the alleged purchases of goods were false; that the rapid growth of each claimant's sales and income were unbelievable in light of the capital and financing reported in their own records; that the export subsidy provided by the Colombian government was insufficient to

5. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico Ltda., et al., also argue (93-1002 Pet. 43-47; 93-1018 Pet. 41-46; 93-1061 Pet. 42-47; 93-1073 Pet. 43-48) that the forfeiture of the funds in question violated the Eighth Amendment and was contrary to *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Petitioners have waived that claim because they did not raise it until their petitions for rehearing in the court of appeals, and that court did not pass on it. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' Eighth Amendment claim has no merit. In *Austin*, this Court held that forfeitures of property under 21 U.S.C. 881(a)(4) and (a)(7) that are "used or intended for use to facilitate" drug transactions may violate the Eighth Amendment, because they must be characterized as penal in nature. See 113 S. Ct. at 2811. The jury verdicts in this case, however, were *not* based on a finding that the funds in question were used to facilitate the commission of a crime. Instead, the jury verdicts determined that the forfeited funds were proceeds of Santacruz-Londono's drug and money laundering enterprise and were thereby forfeitable under 21 U.S.C. 881(a)(6). See Pet. App. 16b-18b; *id.* at 15a-16a.

Nothing in *Austin* suggests that the proceeds of illegal activity—as opposed to instrumentalities that facili-

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support the claimants' business activities; and that there was not enough cash in their accounts to pay their alleged business expenses. Gov't C.A. Br. 27-28. In addition, unusually large sums of money were transferred to the claimants after the arrests of the Santacruz-Londono associates in Luxembourg. *Id.* at 28.

tate such activity—could ever be "excessive" for Eighth Amendment purposes. To the contrary, the Court in *Austin* noted that "the forfeiture of contraband itself may be characterized as remedial"—and therefore outside the ambit of the Eighth Amendment—but that the same reasoning is not necessarily applicable to property that is merely an "instrument[]" of the drug trade. 113 S. Ct. at 2811. We are aware of no authority suggesting that the government must in some circumstances permit a criminal to retain—or to transfer to another party—the proceeds of a crime, because requiring the criminal to give up the proceeds would be excessive in relation to the severity of the crime. Accordingly, petitioners have failed to state an Eighth Amendment claim.[11]

6. Petitioners Organizacion JD Ltda., et al., argue (93-1020 Pet. 29-33) that the court of appeals erred in upholding the IRS levy against funds that were not found to be traceable to drug trafficking or money laundering.

Petitioners argue that because the district court already had entered a final judgment authorizing the return of their claimed funds to them, the court was without authority to amend that judgment and honor what they assert is a defective IRS levy.[12] Contrary to petitioners' argument, the district court was required to honor the IRS levy without inquiring into its validity or

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[11] Petitioners also claim that it violated their due process rights to forfeit the funds because they were innocent owners. They presented the innocent owner claim to the jury at trial and, with one exception, the jury rejected it.

[12] The IRS levy in fact was served on the clerk of the district court one week prior to the district court's entry of judgment. See Pet. App. 97b. After the district court issued its judgment, the government moved to amend the judgment to honor the levy. Instead of amending the judgment, the district court simply authorized the clerk to comply with the levy. *Id.* at 97b-98b.

competing claims to the funds levied upon. *United States* v. *National Bank of Commerce*, 472 U.S. 713, 721 (1985); *United States* v. *Badger*, 930 F.2d 754, 756 (9th Cir. 1991). As the court of appeals recognized, if petitioners want to contest the ownership of the funds levied upon, they must bring a wrongful levy action under 26 U.S.C. 7426. *United States* v. *Badger*, 930 F.2d at 757. Petitioners have in fact already filed such an action. See 93-1020 Pet. 31 n.13. Their wrongful levy claim accordingly should be adjudicated as provided by statute in the wrongful levy action, not in the context of this forfeiture case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1994

Nos. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA.,
COMERCIAL ESTRELLA LTDA., and
CONFECCIONES Y TEJIDOS NACIONALES LTDA.,
Petitioners,

vs.

MANUFACTURERS HANOVER TRUST COMPANY,
BANCO ATLANTICO, S.A., and
THE BANK OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI IN PETITIONS NO. 93-1002, 93-1018, 93-1019, 93-1061 AND 93-1073 WHEN PETITIONERS HAVE WITHDRAWN THEIR APPEAL AND NO APPEAL IS PENDING IN THE CIRCUIT COURT.

II. WHETHER THE COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI IN PETITION NO. 93-1020 WHEN THE CIRCUIT COURT HAS NOT GIVEN JUDGMENT, AND WHEN PETITIONERS HAVE NOT DEMONSTRATED THAT THE CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE.

III. WHETHER PETITIONERS MAY HOLD INTERMEDIARY BANKS INVOLVED IN ELECTRONIC FUNDS TRANSFER TRANSACTIONS LIABLE FOR ALLEGED VIOLATIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT, WHEN THE PETITIONERS ARE NOT "CUSTOMERS" OF THE BANKS WITHIN THE MEANING OF THE ACT.

IV. WHETHER INTERMEDIARY BANKS THAT PROVIDED INFORMATION TO THE GOVERNMENT CONCERNING ELECTRONIC FUNDS TRANSFERS MAY BE HELD LIABLE FOR ALLEGED VIOLATIONS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, WHEN THE BANKS ACTED IN GOOD FAITH COMPLIANCE WITH *IN REM* WARRANTS AND ADMINISTRATIVE SUBPOENAS, WERE PARTIES TO THE ELECTRONIC FUNDS TRANSFER COMMUNICATIONS AND DID NOT "INTERCEPT" THEM.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to all the Petitions:

The Petitioners are Organizacion JD Ltda., Manufacturas JD Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufactura del Atlantico Ltda., Manufacturas Internacionales Ltda., and Industrias Marathon Ltda.

Respondents are Banco Atlantico, S.A., The Bank of New York and Manufacturers Hanover Trust Company (succeeded by merger by Chemical Bank) (collectively the "Banks").

Pursuant to Rule 29.1 of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

> *The Bank of New York Company, Inc.*, ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York, N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida, N.A.;

The Bank of New York, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp., BNY New Amsterdam, Inc., Flugel FSC, Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear, Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-SC, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc., NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings, Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investments, Inc., Station Mall, Inc., Techcen, Inc., Techcen II, Inc., The Fourten South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding, Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees

No. 1 Limited, The Bank of New York (Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Crediban-co, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY Corporation, *Real Estate Subsidiaries*, 65th Street Townhouse, Inc., 200 Lombard St., Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holding, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

Manufacturers Hanover Trust Company, whose successor by merger is Chemical Bank, identifies the following parent companies and principal subsidiaries:

Chemical Banking Corporation, BaCh Holding Corporation, Brown & Company Securities Corporation, CBC-USA, Inc., CBC Capital Partners, Inc., CBC Holding (Delaware), Inc., Chemical Bank Delaware, CBD Holdings Ltd., SFC Agency, Inc. (OH), Chemical Data Services Corporation, Chemical Insurance Agency, Inc., SFC Agency, Inc. (NY) (d/b/a Chemical Insurance Agency of New York), The CIT Group Holdings, Inc., CBNA Holdings Inc., Chatham Ventures, Inc., Chemadvertising, Inc., Chemical

Bank, Chemical Bank National Association, Chemical Business Credit Corp., Chemical Capital Corporation, Chemical Capital Financing, Ltd., Chemical Commercial Real Estate Advisors, Inc., Chemical Connecticut Corporation, Chemical Educational Services Corporation, The Tuition Plan of New Hampshire, Inc., Tuition Plan Financial Services, Inc., Tuition Plan Consumer Discount Company, Chemical Equity Incorporated, Chemical Venture Capital Corporation, Contcable Corporate Advisers, Inc., Chemical Acceptance Corporation, Chemical Acceptance Corporation I, Chemical Mortgage Acceptance Corporation, Chemical Bank of Canada, Chemical Bank Canada Lease Inc., Chemical Commercial Mortgage Securities Corp., Chemical Community Development, Inc., Chemical International Finance, Ltd., Banco Chemical (Portugal) S.A., Chemical Bank-France, Chemica Bank, A.G., Chemco International, Inc., Chemgraphics Systems, Inc., ChemLease Worldwide, Inc., ChemNetwork Processing Services, Inc., Chem Credit, Inc., Manufacturers Hanover Leasing Corporation, MH Financial Management Systems Inc., Texas Commerce Bancshares, Inc., Texas Commerce Brokerage Company, First City, Texas-Fiduciary Services, Inc., Texas Commerce Equities, Inc., Pyramid Agency, Inc.. Texas Commerce Information Systems, Inc., Texas Commerce Bank Foundation, Inc., Texas Commerce Funding Company, Texcom Venture Capital, Inc., Texas Commerce Shareholders Company, Gulf Building Corporation, Texas Commerce Services Company, Texas Commerce Bancshares Leasing Company, Texas Commerce Leasing Company, Texas Commerce Financial Services, Inc., Texas Commerce Capital Markets, Inc., Texas Commerce Corporate Finance, Texas Commerce Securities, Inc., Texas Commerce Bank (Delaware), Texas Commerce Mortgage Co., Texas Commerce Investment Management Co., Texas Commerce Bank - Corpus Christi, N.A., Texas Commerce Bank - San Angelo, N.A., Texas

Commerce Trust Company of New York, Texas Commerce Bank National Association, Houston, TCB - Leasing Company, Texas Commerce Commercial Leasing Company, Texas Commerce Equipment Leasing Company, Texas Commerce National Leasing Company, Texas Commerce International Leasing Company, Texas Commerce Investment Company, Texas Commerce Mortgage Co., Chemical Financial Services Corporation, Ltd., Chemical Card Services Corporation, Chemical Financial Services Corporation (AZ), Chemical Financial Services Corporation (CA), Chemical Financial Services Corporation (FL), Chemical Financial Services Corporation (GA), Chemical Financial Services Corporation (IL), Chemical Financial Services Corporation (NC), Chemical Financial Services Corporation (PA), Chemical Financial Corporation (TX), Chemical Financial Corporation (WA), Chemical Financial Services Corporation (CO), Chemical Financial Services Corporation (IN), Chemical Financial Services Corporation (KY), Chemical Financial Services Corporation (LA), Chemical Financial Services Corporation (SC), Chemical Financial Services Corporation (TN), Chemical Financial Credit Services Corporation (KY), Sun States Life Insurance Company, Great Lakes Insurance Company, Lorry, Ltd., Chemical Student Services Corporation (CO), Chemical Financial Investment Corporation, Chemical Financial Services Corporation (OH), Chemical Financial Acceptance Corporation (OH), Chemical Financial Services Corporation (OH), Chemical Student Services Corporation (OH), Chemical Futures, Inc. (Inactive), Chemical Futures & Options, Inc., Chemical Futures Management, Inc., Chemical Holding Delaware Inc., CBC Holdings (California) Inc., Van Deventer & Hoch, Chemical Thrift Holdings Inc., Chemical Bank Florida (Savings Bank), Chemical Trust Company of California, The Chemical Investments, Inc., Chemical Mortgage

Securities, Inc., Chemical New Jersey Corporation, Chemical New Jersey Holdings, Inc., Chemical Bank New Jersey National Association, Princeton Bank and Trust Company, National Association, Chemical Investor Services, Inc., Chemical Pennsylvania Corporation, Chemical New York, Inc., Chemical New York - N.V., Chemical Real Holdings, Inc., Chemical Realty Corporation, Side Corp., Chemical Mortgage Corporation, Chemical Securities, Inc., Chemical Securities Holdings, Inc., Chemical Broker Holdings, Inc., Chemical Shareholder Services Group, Inc., Chemical Technologies Corporation, Pronto U.S.A., Inc., BankLink, Inc., Electronic Customer Services, Inc., Pronto, Inc., Chemical Temporaries Incorporated, CVP Management Corp., Manufacturers Hanover Inversiones Y Leasing Limitada, Manufacturers Hanover Leasing International Corp., Manufacturers Hanover Leasing (Nassau) Limited, Manufacturers Hanover Inversiones y Leasing Limitada, Manufacturers Hanover Arrendamento Mercantil S.A., Manufacturers Hanover Wheelcase, Inc. MH World Trade Corporation Mexico, Offshore Equities, Inc., The Andean Fund, Inc., Equifin, Chemical Overseas Holdings, Inc., Select Andean Holdings, Inc., Select Brazilian Holdings, Inc., Chempar Participacoes e Emprendementos Ltd., Select Capricorn Holdings, Inc., Select Cassiopeia Holdings, Inc., Select Life Holdings, Inc., Select Orion Holdings, Inc., Select Pacific Holdings, Inc., Select Rio Grande Holdings, Inc., Select Southern Holdings, Inc., Select Southern Star Holdings, Inc., Sociedad Mexicana Para La Industria Y El Comercio S.A., The Portfolio Group, Inc.

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JURISDICTION

Petitioners purport to base jurisdiction on 28 U.S.C. §§ 1254(1) and 2101(e). As shown below, however, the Court's jurisdiction is precluded by Sup. Ct. R. 11.

STATUTES INVOLVED

THE RIGHT TO FINANCIAL PRIVACY ACT

12 U.S.C. § 3401. **Definitions**

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

12 U.S.C. § 3413: **Exceptions**

(a) **Disclosure of financial records not identified with particular customers**

Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511: **Interception and disclosure of wire, oral, or electronic communications prohibited**

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2520: **Recovery of civil damages authorized**

(d) Defense.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2703:

(e) **No cause of action against a provider disclosing information under this chapter.**-- No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707: **Civil action**

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: **Forfeitures**

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

> Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . . , except that seizure without such process may be made when –
>
> . . .
>
> (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture
>
> . . . .

Rules of the Supreme Court:

> Rule 11: Certiorari to a United States Court of Appeals Before Judgment.
>
> A petition for a writ of certiorari to review a case in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e).

COUNTERSTATEMENT OF THE CASE

The Banks respectfully submit this Brief in Opposition to Petitions No. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073 (collectively, the "Petitions"). The Court granted the Banks' request to file this consolidated opposition in response to the Petitions.

A. *THE UNDERLYING ACTIONS*

The Petitions are an amalgamation of three different legal actions, each of which is in a different procedural posture: 1) *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) ("*All Funds*");[1] 2) *Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992), *appeal withdrawn per stipulation*, No. 92-7360 (2d Cir. 1992) ("*Consolidated Bank Cases*"); and 3) *Organizacion JD Ltda. and Manufacturas JD Ltda. v. United States Department of Justice, Drug Enforcement Administration of the United States of America, Banco Atlantico, S.A. and The Bank of New York, appeal docketed*, No. 93-6019 (2d Cir. Jan. 23, 1993) ("*Organizacion JD*").

All Funds is a civil forfeiture action brought by the United States. All of the petitioners appeared as claimants in that action. Following entry of a judgment of forfeiture against property to which they had asserted claims, petitioners filed an appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed that judgment. The Banks were not parties to *All Funds*.

In *Consolidated Bank Cases*, certain claimants in *All Funds* brought actions against the Banks. These actions were consolidated and subsequently dismissed by the United States District Court for the Eastern District of New York pursuant to the grant of summary judgment in favor of the Banks. Following the filing of a Notice of Appeal, appellants, by stipulation

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[1] Petitioners refer to the *Daccarett* decision as *U.S. v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc.*, as the case bore that caption in the District Court. To avoid confusion, the case will be referred to here as "*All Funds*."

which was so ordered by the court, agreed to withdraw and not reinstate their appeal in *Consolidated Bank Cases* until final resolution, including all appeals, of *All Funds*. Subsequently, the Second Circuit denied petitioners' premature motion to reinstate their appeal. Accordingly, no appeal is pending.

In *Organizacion JD*, other claimants in *All Funds* brought an action against the United States Department of Justice, the Drug Enforcement Administration, Banco Atlantico and The Bank of New York. Following dismissal of the action by the District Court, plaintiffs filed an appeal with the United States Court of Appeals for the Second Circuit. The Second Circuit heard oral argument on May 3, 1993 but has not rendered a decision.

B. *THE PETITIONS*

In the Petitions, the petitioners have chosen to mix and match the parties in the three actions:

- In Petition No. 93-1002, petitioners Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda., which were appellants in *All Funds* and plaintiffs in *Consolidated Bank Cases*, name the Banks as respondents, all of which were defendants in *Consolidated Bank Cases*;

- In Petition No. 93-1018, petitioner Abuchaibe Hnos. Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Banco Atlantico (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1019, petitioner Comercial Samora Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Banco Atlantico (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1061, petitioner Industrias Marathon Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Manufacturers Hanover Trust Company (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1073, petitioners Manufactura del Atlantico Ltda. and Manufacturas Internacionales Ltda., which were appellants in *All Funds* and plaintiffs in *Consolidated Bank Cases*, name as respondents the United States (an appellee in *All Funds*), and Manufacturers Hanover Trust Company (a defendant in the *Consolidated Bank Cases*); and

- In Petition No. 93-1020, petitioners Organizacion JD Ltda. and Manufacturas JD Ltda., which are appellants in *Organizacion JD*, name as respondents the United States of America, the Drug Enforcement Administration, Banco Atlantico and The Bank of New York, all of which are appellees in *Organizacion JD*.

C. *BACKGROUND*

The Banks are banking institutions that received court orders and instructions from the United States Attorney for the Eastern District of New York to attach the proceeds of certain Electronic Funds Transfers ("EFTs") pursuant to Warrants of Arrest *In Rem* issued in the *All Funds* civil forfeiture action. (See Appendix to *Organizacion JD*, Exhibit B at 12 (hereafter "Pet. App. ____").[2] Petitioners,[3] all of which were claimants in *All Funds*, were the ultimate beneficiaries of certain EFTs attached by the United States.

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[2] For the Court's convenience, respondents have selected the Appendix to *Organizacion JD* as representative of all the appendices submitted by all the petitioners to support all factual references herein.

[3] Comercial Samora Ltda., Abuchaibe Hnos. Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Organizacion JD Ltda., Manufacturas JD Ltda., Industrias Marathon Ltda., Manufactura del Atlantico Ltda., and Manufacturas Internacionales Ltda.

In July and August 1990, the Banks acted as intermediary banks for the EFTs and complied with court orders and instructions from the United States Attorney to attach the EFT proceeds and pay them into Court. None of the petitioners maintained accounts at the Banks. (Pet. App. B at 12). Rather, petitioners were customers of Colombian banks which, in turn, maintained correspondent banking relationships with one or more of the Banks. (Pet. App. B at 12, E at 14-15). The Banks were instructed by EFT communications to credit funds to the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts.

Before the Banks received the EFT communications, on or about July 18, 1990, the United States District Court for the Eastern District of New York issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals." (Pet. App. B at 13). The United States Attorney's Office had probable cause to believe that these funds represented laundered drug money being transferred from Europe via New York to Colombia.* (Pet. App. B at 12-13).

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. (Pet. App. B at 12-13). In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. (Pet. App. B at 12-13, E at 13-14).

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* On May 13, 1991, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g). (Pet. App. B at 16).

Thereafter, in May 1991, United States District Judge Jack B. Weinstein held a three day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. (Pet. App. B at 17).

The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT funds. The Banks, in a good faith effort to comply with the warrants of arrest, followed the government's orders. (Pet. App. B at 13, E at 13-14).

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorney's Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants of Arrest *In Rem*. (Pet. App. B at 12-13). All of the claimants were specifically identified as entities whose funds were to be attached. (Pet. App. B at 13).

On July 25, 1990, the Banks were served with a "Summons to Show Cause Why Intangible Property Should Not Be Paid Into Court." (Pet. App. B at 13). This Show Cause Order covered both the funds described in the Warrants of Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired. . . ." The Banks, in compliance with the order, segregated the EFT funds and paid them into Court. (Pet. App. A at 13, E at 15-16).

D. *PROCEDURAL HISTORY*

1. *The All Funds Case*

The government's civil forfeiture action in *All Funds* resulted in a unanimous jury verdict forfeiting approximately $10,000,000 to the United States. (Pet. App. A at 74). As described by the Second Circuit, these forfeitures:

> arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel . . . The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics

> proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts. (Pet. App. B. at 9).

The jury also returned approximately $300,000 to two of the claimants — Organizacion JD Ltda. and Manufacturas JD Ltda. — which the jury determined had met their burden of proving that the funds they claimed were not traceable to illegal activities. (Pet. App. A at 75).

By memorandum decision dated August 5, 1992, the District Court denied the claimants' motion for either a new trial or judgment as a matter of law. (Pet. App. A at 5, 72). The Second Circuit affirmed the District Court decision on April 2, 1993, and subsequently denied a petition for rehearing. (Pet. App. C at 1).

2. *The Consolidated Bank Cases*

While *All Funds* was pending in the Eastern District of New York, eight of the claimants[5] (represented by the same counsel who represented them in *All Funds*) filed ten separate civil actions in the Southern District of New York against the Banks, asserting claims arising from the Banks' compliance with the orders of the Court to attach the EFT proceeds. On motion by the Banks, those cases were consolidated and transferred to the Honorable Jack B. Weinstein in the Eastern District of New York, under the caption *Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992).

The Banks then moved to dismiss the consolidated actions pursuant to Fed. R. Civ. P. 12(b)(6). Judge Weinstein converted the motion to one for summary judgment and granted the Banks' motion in its entirety and dismissed the complaints.

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[5] Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Manufactura del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda, Manufacturas Internacionales Ltda. and Industrias Marathon Ltda.

The plaintiffs in *Consolidated Bank Cases* filed a Notice of Appeal. However, before perfecting the appeal, the parties entered into a stipulation that was so ordered by the Second Circuit, in which plaintiffs withdrew their appeal with leave to reinstate "within 15 days after *final disposition, including all appeals* in [the *All Funds* Case]." (emphasis added) (a copy of the stipulation is annexed hereto as Respondents Appendix A____ (hereafter "Resp. App. ____")). After receiving the adverse jury decision in *All Funds*, plaintiffs moved to reinstate the appeal in *Consolidated Bank Cases* in direct contravention of the stipulation. The Second Circuit denied the motion on October 14, 1993. Thus, no appeal is pending in the Second Circuit in *Consolidated Bank Cases*.

3. *Organizacion JD*

Meanwhile, on August 5, 1992, after the conclusion of the *All Funds* trial, the two claimants whose funds were not forfeited, Organizacion JD Ltda. and Manufacturas JD Ltda., commenced the *Organizacion JD* action. Banco Atlantico, The Bank of New York and the United States defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) in November 1992. The District Court granted the motions.

Organizacion JD Ltda. and Manufacturas JD Ltda. appealed from the dismissal to the United States Court of Appeals for the Second Circuit. Oral argument was heard on May 3, 1993. A decision has not been rendered as of the date of this submission.

SUMMARY OF THE ARGUMENT

Each of the Petitions suffers from a fatal jurisdictional defect and is not properly before the Court. Only in Petition No. 93-1020 is an appeal pending in the Circuit Court involving any of the Banks, and that appeal has not been decided. Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 fail to satisfy the requirement of Rule 11 of the Rules of the Supreme Court of the United States ("Rule 11") that an appeal must be pending in a United States Court of Appeals in order for the Court to grant a petition for a writ of certiorari. No appeal is pending because petitioners stipulated to withdraw it.

Petition No. 93-1020 is jurisdictionally defective because, although an appeal is pending in that action, no decision and order has been rendered by the Circuit Court, and the Petition fails to raise issues of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

Even if the Petitions were free of jurisdictional defects, which they are not, the cases from which the Petitions arise were correctly decided below. Under the express terms of the Right to Financial Privacy Act, petitioners are not customers of the Banks and therefore have no standing to pursue claims against them.

In addition, no statutory "interception" occurred under the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act. The Banks, as the intended recipients of EFT communications properly received the communications in the ordinary course of their business and complied in good faith with court orders and instructions from the United States Attorney in providing information concerning the EFTs. The District Court properly held that the Banks incurred no liability for having done so.

Therefore, the Petitions are fatally defective and do not raise any issues that merit review by the Court.

REASONS FOR DENYING THE WRIT

I.

PETITIONS NO. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 SHOULD BE DENIED BECAUSE THEY SEEK REVIEW OF CASES FOR WHICH THERE IS NO APPEAL PENDING IN THE COURT OF APPEALS, AND THEREFORE FAIL TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF SUPREME COURT RULE 11

Petitioners have asked the Court to consolidate for review the decisions in *All Funds*, an action to which the Banks were not parties, with *Consolidated Bank Cases* and *Organizacion JD*, *see e.g.* Petition No. 93-1073 at 3; Petition No. 93-1020 at 5. Even if the Court decides to review *All Funds*, it should reject petitioners' request because, as shown below, *Consolidated Bank Cases* and *Organizacion JD* are not ripe for review.

Moreover, although the cases share some common issues, the core issues in *Consolidated Bank Cases* and *Organizacion JD*, *i.e.* those concerning civil liability of intermediary banks for compliance with court orders, are unique to those cases. The Second Circuit has not yet been given the opportunity to consider these issues.

Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 fail to satisfy Rule 11 of the Rules of the Supreme Court, which provides that a party may seek the Court's review only if there is an appeal pending in the Court of Appeals.[6] Petitioners

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[6] There are only three types of cases which are directly appealable from federal district courts to the Supreme Court: (1) when a district court holds a federal statute unconstitutional in a civil action to which the United States is a party, 28 U.S.C. § 1252; (2) when a specific act of Congress requires that a three-judge district court be convened and provides for a direct appeal to the Supreme Court; and (3) when a one-judge district court, having entered a final judgment in a civil action in equity brought by the United States to enforce the antitrust laws, states by order entered on application of the appealing party

(Footnote continued)

seek review of *Consolidated Bank Cases*, which is not pending in the United States Court of Appeals.

In fact, petitioners in Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073, stipulated to withdraw their appeal and not reinstate it until the final disposition of *All Funds*, including all appeals. Despite this stipulation, these petitioners moved before the Second Circuit to have the *Consolidated Bank Cases* appeal reinstated prior to a final disposition in *All Funds*. The Second Court properly denied petitioners' motion to reinstate the *Consolidated Bank Cases* appeal because that appeal is premature. Petitioners should be estopped from disputing the binding nature of their stipulated order. *See Sohappy v. Smith*, 529 F.2d 81 (9th Cir. 1976) (party estopped from attacking decree after having consented to be bound by it); *see also Calvin Klein Ltd. v. Trylon Trucking Corporation*, 892 F.2d 191, 194 (2d Cir. 1989).

Contrary to petitioners' suggestion, they have not been denied an opportunity for Second Circuit review. Instead, the Circuit Court, in the management of its own calendar, has merely sought to enforce the terms of the stipulated order which petitioners executed. Petitioners may yet have their day before the Second Court in due course after the final disposition of *All Funds*.

II.

PETITION NO. 93-1020 SHOULD BE DENIED BECAUSE THE APPEAL HAS NOT BEEN DECIDED BY THE SECOND CIRCUIT, AND PETITIONERS HAVE NOT SHOWN THAT THIS CASE SATISFIES THE STANDARD OF SUPREME COURT RULE 11

In Petition No. 93-1020, petitioners' appeal to the Second Circuit in *Organizacion JD* was argued on May 3, 1993; no

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that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." Expediting Act of 1903, as revised in 1974, 15 U.S.C. § 29(b). *Consolidated Bank Cases* does not fit within any of the categories of cases directly appealable from a district court to the Supreme Court and, in any event, petitioners have not satisfied the requirement of filing a notice of appeal within thirty days. Sup. Ct. R. 18.

decision has been rendered by the Second Circuit. The Supreme Court Rules provide that under such circumstances, a petition for a writ of certiorari will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

Petitioners have not articulated, and are unable to show, how this case meets the stringent Rule 11 standard. Their argument is simply that the Second Circuit, by its decision in *All Funds*, has improperly denied their "right to damages" (Petition No. 93-1020 at 49-50). Petitioners do not explain why their alleged right to collect damages in a commercial dispute with the Banks is so imperative to the public that the Court should condone circumvention of the normal appellate procedure.[7] There is no national emergency here. The general public will not be affected if petitioners wait for the Second Circuit to render its decision in *Organizacion JD*. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) ("certiorari [should not be granted] except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . ."). Accordingly, Petition No. 93-1020 should be denied.

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[7] Petitioners recognize the bar to the present Petitions occasioned by Rule 11. They assert that "[d]eviation from normal appellate process" in the *Consolidated Bank Cases* is warranted because the Circuit Court erred in denying their motion to reinstate their appeal. Petitioners contend this is so because *All Funds* and *United States v. Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al.*, 113 S. Ct. 1126 (1993) (hereinafter "*Buena Vista*") overruled the District Court's use of the relation back doctrine to bar a claim against the United States. This is a *non sequitur*. The United States is not a party to *Consolidated Bank Cases*. Petitioners concede that the Second Court in *All Funds* did not rely on the District Court's interpretation of the relation back doctrine. (Pet. No. 93-1018 at 50). Moreover, as shown below, *Consolidated Bank Cases* and *Organizacion JD* were correctly decided regardless of whether the relation back doctrine applies. Even if the doctrine were misapplied, the Second Court will have the opportunity to remedy the situation when *Consolidated Bank Cases* is properly before it.

III.

THE DISTRICT COURT CORRECTLY DECIDED THE BANKS DID NOT VIOLATE THE RIGHT TO FINANCIAL PRIVACY ACT

No issue meriting review by this Court was decided erroneously when the District Court held that petitioners lacked standing under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* ("RFPA"). Petitioners incorrectly alleged below that the Banks violated the RFPA by (i) intercepting and holding a wire transfer communication; and (ii) providing government officials with information regarding the EFTs.

The RFPA provides a private right of action against a financial institution only to "customers" of that institution, 12 U.S.C. § 3413(a). Under the RFPA, a customer is any individual or partnership of five or fewer individuals who utilized or is utilizing any service of a financial institution in relation to an account maintained in the person's name. 12 U.S.C. § 3401(4), (5). (Pet. App. E at 35, B at 47-58).

None of the petitioners was a customer of the Banks and none maintained accounts with the Banks in their own names. (Pet. App. B at 12, E at 37). In addition, because petitioners are neither individuals nor partnerships[8] of five or fewer individuals, petitioners do not fit within the narrow definition of persons protected by the RFPA. *See Securities & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984) (RFPA "carefully limits the kinds of customers to whom it applies"). The record is explicit that the seized funds were to be credited to the accounts of designated Colombian banks. (Pet. App. B at 55). Even after the funds were seized they were held pursuant to the warrants of arrest and not in accounts maintained by petitioners at the Banks. *See Ridgeley v. Merchants State Bank*, 699 F. Supp. 100,

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[8] Despite petitioners' contention that they are "limited partnerships," their motion pursuant to Rule 44.1 of Federal Rules of Civil Procedure, dated September 15, 1992 filed in *Organizacion JD* shows that under Colombian law they are in fact "limited liability companies."

102 (N.D. Tex. 1988); *Duncan v. Belcher*, 813 F.2d 1335, 1338-39 (4th Cir. 1987).

The District Court correctly held that the RFPA can be enforced only by customers; since petitioners are not customers they have no standing under the RFPA, and cannot rely on it to pursue a claim against the Banks. (Pet. App. E at 35, B at 47). Accordingly, even if the Petitions were free of jurisdictional defects, which they are not, the RFPA does not provide a ground for granting the Petitions.

IV.

THE DISTRICT COURT CORRECTLY DECIDED THAT THE BANKS DID NOT VIOLATE THE ELECTRONIC COMMUNICATIONS PRIVACY ACT BY COMPLYING WITH COURT ORDERS AND INSTRUCTIONS FROM THE UNITED STATES ATTORNEY TO PROVIDE INFORMATION CONCERNING EFT COMMUNICATIONS DIRECTED TO THE BANKS

Petitioners also fail to articulate why the District Court's interpretation of the term "interception" merits review by this Court, especially given that the Banks acted pursuant to lawful Warrants of Arrest. It is indisputable that the Banks did not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (the "Omnibus Act"), as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2701-2710 ("ECPA").

A. *As a Matter of Law, the Banks Could Not Have Intercepted Communications Related to the EFTs*

Petitioners claim that the Banks violated the ECPA by illegally intercepting EFT communications and by providing to the government information contained in those communications. This claim is seriously flawed. No interception occurred here.

The statute defines the term "interception" as "the aural or other acquisition of contents of any wire, electronic, or oral

communications through the use of any electronic, mechanical or other device." 18 U.S.C. § 2510(4); *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) (the ECPA applies to "communications which pass from their origin to the intended recipient and are subject to third-party intervention"). The Banks, as intended recipients of the communications, did not "intercept" but properly received the communications in the ordinary course of their business. No statutory interception did occur or could have occurred here. *See* 18 U.S.C. § 2510(4).

B. *The Banks Are Entitled to the Court's Protection*

1. *The Banks Acted Under Color of Law*

Even if the Court were to find that the Banks intercepted a communication, no liability would result because that conduct falls squarely within an express exception to the provisions of the Omnibus Act. Section 2511(2)(c) of the Omnibus Act provides,

> It shall not be unlawful under this chapter for a person *acting under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added).

The Banks took no independent steps with respect to the EFT communications; they simply abided the court orders and directives of the United States Attorney (Pet. App. E at 51). Accordingly, even if the Court found that an interception occurred, the Banks' actions "under color of law" would preclude any liability under the Omnibus Act. *See United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990).

2. *The Banks Acted in Compliance with Court Orders and are Absolved from any Liability*

Even if the Banks were providers of electronic communication services within the meaning of the ECPA, as petitioners allege, the Banks' compliance with the Warrants of Arrest

absolves them of any liability, pursuant to 18 U.S.C. § 2703(e); 18 U.S.C. § 2520(d)(1); and 18 U.S.C. § 2707(d)(1).

As set forth in 18 U.S.C. § 2703(e):

> No cause of action shall lie in any court against any provider of wire or electronic communications service . . . for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this chapter.

Similarly, 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), the statutes authorizing civil actions for interception and disclosure of electronic communications, both provide a complete defense to any action when there is a good faith reliance on a "court warrant or order . . . or a statutory authorization." *See also* 18 U.S.C. § 2511(2)(a)(ii). (Pet. App. E at 54-55). As the District Court properly decided, the Banks acted in good faith reliance on both warrants and court orders and the statutory authorization granted to the Attorney General under 21 U.S.C. § 881(b)(4), and are entitled the protection of the Court for having done so. *See* Pet. App. E. at 51 ("The Banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court").

CONCLUSION

For the foregoing reasons the Petitions for writ of certiorari should be denied.

Dated: February 18, 1994

Respectfully submitted,

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APPENDIX

MANUFACTURAS INTERNACIONAL	)	
	)	
V	)	Docket #92-7360
	)	
MFRS HANOVER TRUST CO & CONSOLIDATED CASE	)	

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal is hereby withdrawn without costs and without attorneys' fees and without prejudice, subject to reinstatement by written notice to the Clerk of this Court within 15 days after final disposition, including all appeals of USA v. All Funds on Deposit at Merrill Lynch etc. CV90-2510 in Eastern Dist of NY; and if not thus reinstated, shall be deemed withdrawn with prejudice.

/s/ Maureen K. Stein
Attorney for Appellee
Manufacturers Hanover
Trust Company

/s/ Isidoro Rodríguez
Attorney for Appellant

/s/ Michael Povman
Attorney for Appellee
Michael D. Povman
Attorney for The Bank of
New York

/s/ Mark S. Sullivan
Attorney for Appellee
Townley & Updike
by: Mark S. Sullivan
Attorneys for Banco
Atlantico

Counsel: Please print name and firm under signature.

SO ORDERED:

FOR THE COURT,

/s/ Elaine Goldsmith
Elaine B. Goldsmith
Clerk

May 1, 1992
(Date)

ATACHMENT I
[sic]

Supreme Court U.S.
FILED
MAR 10 1994
OFFICE OF THE CLERK

Nos. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioners,

v.

United States of America,

Respondent.

Abechaibe Hnos. Ltda.,

Petitioner.

v.

United States of America, and Banco Atlantico.

Respondents.

Comercial Ramora Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

Respondents.

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CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

FIFTH AMENDMENT

No person . . . shall be deprived of life, liberty or property, without due process of law. . . .

28 U.S.C. 2101(e)

An application to the Supreme Court for a writ of certiorari to review a case before judgement has been rendered in the court of appeals may be made at any time before judgment.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

Rule 11 of the Supreme Court Rules

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgement is given in that case, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to required immediate settlement in this Court.

Rule 12.2 of the Supreme Court Rules

. . . When two or more cases are sought to be reviewed on a writ of cer-

tiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. . . .

Rule 4 of the Civil Appeals Management Plan, Rules of the Second Circuit, Part C.

Scheduling Order; Contents.

(a) In all civil appeals the staff counsel of the Court of Appeals shall issue a scheduling order as soon as practicable after the pre-argument statement has been filed unless a pre-argument conference has been directed in which event the scheduling order may be deferred until the time of the conference in which case the scheduling order may be entered as part of the pre-argument conference order.

(b) The scheduling order shall set forth the dates on or before which the record on appeal, the brief and appendix of appellant, an the brief of appellee shall be filed and also designate the week during which argument of the appeal shall be ready to be heard.

Rule 5 of the Civil Appeals Management Plan, Rules of the Second Circuit, Part C.

Pre Argument Conference; Pre-Argument Conference Order.

(a) In cases where Staff Counsel may deem this desirable, the staff counsel may direct the attorneys to attend a pre-argument conference to be held as soon as practicable before Staff Counsel or a judge designated by the Chief Judge to consider the possibility of settlement, the simplifications of the issues, and any other matters which the staff counsel determines may aid the handling or the disposition of the proceeding.

(b) At the conclusion of the conference the Staff Counsel shall enter a pre-argument conference order which shall control the subsequent course of the proceeding.

Rule 3 of the of the Guidelines for the conduct of Pre-argument conference under the Civil Appeals Management Plan, Rules of the Second Circuit, Part D.

Good Faith and Non-Coerciveness

The parties are obligated to participate in good faith with a view to resolving differences as to the merits and issues. This process requires each attorney, no matter how strong the att-

orney's views, to exercise a degree of objectivity, patience and cooperation that will permit the attorney to make a decision based on reason. In this process the Staff Counsel, who provides objective expertise in a forum for appraisal of the merits and expedition of each appeal, is entitled to their respect and the Staff Counsel's views should be carefully considered. The Staff Counsel's views, however, are Staff Counsel's own and not those of a the court, with which Staff Counsel does not communicate about a case. If, after this procedure, attorneys believe in good conscience they cannot reach an agreement, they are not under any compulsion to do so.

Rule 8 of the of the
Guidelines for the conduct of
Pre-argument conference
under the Civil Appeals
Management Plan, Rules of
the Second Circuit, Part D.

Any grievances as to the handling of any case under the CAMP program should be addressed to the Circuit Executive, Steven Flanders, Room 1803, who will hold them confidential on behalf of the Circuit Court of Appeals unless release is authorized by the complainant.

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Comercial Samora Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

Respondents.

Industrias Marathon Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

Manufacturera del Atlantico Ltda., and Manufacturas Internacionales Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT REPLY TO BRIEFS IN OPPOSITION

DISCUSSION

Petitioners Manufacturers Del Atlantico Ltda., Industrias Marathon Ltda., Abuchaibe Hnos. Ltda., Manufacturas Internacional Ltda., Comercial Samora

Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda. (hereinafter the "Atlantico Group"), were all claimants in the civil in rem forfeiture action United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case").

Based on District Court Judge Jack B. Weinstein's (hereinafter Judge Weinstein), use of the "relation back doctrine," in the All Funds Case (App-48a to 51a)[1], to hold inapplicable the provisions of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. and §§ 2701 et seq., (hereinafter "ECPA"), and thus deny the motion

[1]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with these Petitions.

under 18 U.S.C. §§ 2515 and 2518(9), to exclude as evidence all in transit, or held in computer storage for less than 180 day,[2] electronic fund transfer communications obtained by the Government without a search warrant issued under the Federal Rules of Criminal Procedures, the Atlantico Group did not succeed in the prosecution of their claims for return of their respective intercepted and seized electronic funds transfers; and in the prosecution of their counterclaims for damages against the United States (hereinafter "the Government") under 18 U.S.C. §§ 2520 and 2707-(a), because of the Government's procuring of the interception of in

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[2]For purposes of exclusion under 18 U.S.C. § 2515, under the ECPA an in transit electronic communication includes any electronic communication held for less than 180 days in computer storage 18 U.S.C. § 2702(a).

transit electronic funds transfer communications in violation of 18 U.S.C. § 2510 and 2511(1)(a) and (c), through the placing of "stop ques" in the computer modems of Banco Atlantico, The Bank of New York and Manufacturers Hanover Trust Co. (hereinafter "the Intermediary Banks");[3] and the Government's obtaining from the Intermediary Banks, all electronic funds transfer communications which had gone to the Republic of Colombia, and were in computer storage for less than and more than 180 days, without either a search warrant being issued

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[3]The Intermediary Banks collaboration in the warrantless searches of all wire transfers going to the Republic of Colombia, is the classic example of the "T" that the Court in United States v. Andonian, 735 F. Supp. 1469, at 1472(C.D. Cal. 1990), was discussing when it said that, "[c]ongress' view of interception can be described as a perpendicular concept, where the interception of a communication crosses its path like the trunk of a `T'."

under the Federal Rules of Criminal Procedure, or an administrative warrant issued with notice, in violation of 18 U.S.C. § 2703(a) and (b).[4]

Furthermore, again based on Judge Weinstein's use of the "relation back doctrine," the Atlantico Group complaint for damages under a separate civil action under the ECPA against the Intermediary Banks in Manufacturas International, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal withdrawn pending final decision in All Funds Case, No. 92-7360 (2d Cir. 1992) (hereinafter the "Consolidated Bank Case"),

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[4]The DEA Report, dated August 20, 1990, (Government bate stamp 000001), submitted during the All Funds Case trial, shows that the providing of notice was prohibited.

was dismissed (App-50d), and all discovery, including on the issues of "interception" and "good faith" was denied.

I. **THE ATLANTICO GROUP'S PETITION BASED ON 28 U.S.C. § 2101(e) AND RULE 11 AND 12.2 OF THE SUPREME COURT RULES, IS A PROPER REQUEST FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION BECAUSE THE SECOND CIRCUIT'S USE OF THE DISTRICT COURT'S DECISION IN THE CONSOLIDATED BANK CASE AS RES JUDICATA, WHEN THEY REPEATEDLY DENY REINSTATEMENT OF THIS PENDING APPEAL IS A VIOLATION OF THE ATLANTICO GROUP'S RIGHT TO DUE PROCESS, RIGHT TO APPEAL UNDER 28 U.S.C. § 1291, AND THE SECOND CIRCUIT'S OWN CIVIL APPEALS MANAGEMENT PLAN.**

On February 24, 1994, the Second Circuit issued its decision in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993)

(hereinafter the "Intermediary Bank Case").[5]

The above decision violates the Atlantico Group's right to due process because:

(a) although the Second Circuit did remand to Judge Weinstein the claim against the Government under 18 U.S.C. § 2707(a), it denied the claims against the Intermediary Banks based on the non-reviewed holding of Judge Weinstein in the Consolidated Bank Case, which the Second Circuit uses as res judicata, although refusing to reinstate the Atlantico Group's perfected pending appeal;[6] and,

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[5]Notice of this decision arrived on March 2, 1994. Separate Supplemental Briefs under Rule 15.7, are being prepared for submission.

[6]The Second Circuit likewise used the Consolidated Bank Case, as res judicata in the All Funds Case, although refusing the motions in

(b) in denying the claim for damages under 18 U.S.C. § 2520, the Second Circuit not only de facto affirms Judge Weinstein's use in the Consolidated Bank Case (App-50d), of the "relation back doctrine," to bar any discovery of the Intermediary Bank on their use of "stop ques" in their computer modems which intercepted the in transit electronic fund transfers, but also again uses the Consolidated Bank Case, as res judicata on the issue of "good faith."[7]

Despite these clear violations of due process, and the abuses of legal

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November, 1992, to reinstate and consolidate the two appeals.

[7]The issue of the claim "good faith," must be remanded to permit discovery based on K/S Norman Agathe v. Sea Trade & Construction, 767 F.Supp. 60 (S.D.N.Y. 1991), where not only did the Beneficiary Bank notify every interested party of the electronic fund transfer communication of the in rem action, but also of the hearing on ownership.

logic in using the doctrine of res judicata when an appeal is pending, the Intermediary Banks would continue to argue that the Court does not have jurisdiction to hear the Consolidated Bank Case, because this appeal is no longer "pending" due to Staff Counsel Frank Scardilly's (hereinafter "Staff Counsel Scardilly") decision that the Stipulation entered into between the parties withdrew the Consolidated Bank Case appeal, pending all appeals in the All Funds Case, including the filing of a Petition for Writ of Certiorari.[8]

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[8]A Petition for Certiorari is not an appeal as of right, but is discretionary; and this Court has rejected the use of the "relation back doctrine" as used in the Consolidated Bank Case, See United States v. A Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al., 113 S.Ct. 1126 (1993) (hereinafter "Buena Vista").

A cursory review of the essential facts involved in the challenged Stipulation, will show that Staff Counsel Scardilly's decisions not only violate due process but is also contrary to the Second Circuit's own operating rules:

(i) the Stipulation was entered into in accordance with Rule 3 of the Guidelines for Conduct of Pre-Argument Conference under the Civil Appeals Management Plan (hereinafter "Management Plan"), on April 24, 1992, after a long and heated conference held by Staff Counsel Scardilly, where Petitioners' vehemently refused to withdraw their appeal in the Consolidated Bank Case;

(ii) it was Mr. Scardilly who was responsible for assuring that the Settlement was a good faith reflection of the position of the parties;

(iii) it was Staff Counsel Scardilly who inserted the handwritten clause in the Stipulation, which Mr. Scardilly later used to deny the Atlantico Group's motions to reinstate on June 26, 1992, November 3, 1992, and October 14, 1993.[9]

Based on these facts, the Atlantico Group argues that Staff Counsel Scardilly's decisions allegedly under the Management Plan, to not reinstate this pending appeal, was both unreasonable and a violation of due process and the Atlantico Group's right to appeal 18 U.S.C. § 1291.

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[9]Based on the Second Circuit's Management Plan the views of the Staff Counsel were not to be transmitted to the Court, and the Atlantico Group was to have been provided an opportunity to have an impartial review of Staff Counsel Scardilly's handling of their case.

In Ortega-Rodriquez v United, 113 S.Ct. 1199 (1993), where the Court restricted the use of the "fugitive disentitlement doctrine" to deny a right of appeal, the Court stated that,

> "[o]ur review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, **but it does demand that such rules represent reasoned exercise of the court's authority.**" Ortega at 1205 (Emphasis added).

In Chief Justice Rehnquist, Justice O'Conner, Justice Thomas, and former Justice White, dissent, they too stated that,

> [i]t is beyond dispute that the courts of appeals have supervisory power to create and enforce "procedural rules governing the management of litigation." Thomas v. Arn, 474 U.S. 140, 146, 106 S.Ct. 466, 470, 88 L.Ed.2d 435 (1985). **The only limit on the authority is that the rules may not violate the Constitution or a statute, and must be reasonable in light of the concerns they are designed to address.** Ortega at 1210 (Emphasis added).

Consequently, in order to determine whether or not jurisdiction exist under the 28 U.S.C. § 2101(e), and Rule 11 and 12.2 of the Supreme Court Rules, the Court must consider whether the Second Circuit's refusal to reinstate the Consolidated Bank Case appeal based on the interpretation of the Stipulation given by Staff Counsel Scardilly entered under the Management Plan, is unreasonable and conflicts with the Atlantico Groups rights to have its perfected pending appeal in the Consolidated Bank Case heard under 28 U.S.C. § 1291, and the Fifth Amendment.

II. THE CONSOLIDATED BANK CASE CONCERNS ISSUES OF IMPERATIVE PUBLIC IMPORTANCE BECAUSE THE SECOND CIRCUIT HAS DEFIED THE CLEAR INTENT OF CONGRESS AS EXPRESSED IN THE ECPA, AS WELL AS THE PROTECTION OF THE FIFTH AMENDMENT.

In Chevron U.S.A., Inc., v. National Resources Defense Counsel, 104 S.Ct. 2778 (1984), the Court stated that in deciding a federal question, the first issue a court must determine is whether Congress has directly spoken to the precise question at issue, and if it is determined that,

> "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." id. at 2781.

Despite this bench mark, the Second Circuit refused to find as a matter of law in the Consolidated Bank Case, the All funds Case, and the Intermediary Bank Case:

(I) that 18 U.S.C. § 2516(3), permits the Government's law enforcement officials to obtain the information in electronic communication in transit only if a court order has been issued under the Federal Rules of Criminal Procedure; and,

(II) in the Consolidate Bank Case, and the All Funds Case, but not in the Intermediary Bank Case[10], that 18 U.S.C. § 2703(a) and (b), permit the Government access to stored electronic communication for: (i) 180 or less only if the Government has obtained a search warrant issued under the Federal Rules of Criminal Procedure; and, (ii) for stored electronic communication messages for more than 180 days, only if the Govern-

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[10]As noted above the Second Circuit remended this issue to Judge weinstein for further consideration.

ment has acquired either: (1) a search warrant issued under the Federal Rules of Criminal Procedures, (2) or a federal administrative subpoena issued with notice to the designated recipient of the communication.[11]

In fact despite the Second Circuit's holding in the All Funds Case, it has been reported,[12] that the Government has begun to promulgate regulations that permit the interception of in transit electronic communication only after the Government has obtained the required

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[11]See §19.5, at p. 372 through 399, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991)

[12]Newsweek, "Bottom Line" page 31, February 14, 1994, The FBI Monitors the Info Highway.

court order issued under the Federal Rules of Criminal Procedure.[13]

Thus it is indisputable that Congress did specifically amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. and §§ 2701 et seq., (hereinafter "ECPA"), to limit the Government access to electronic communications in transit and in computer storage as Petitioners have argued in both the District Court and the Court of Appeals since 1990.

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[13]Other recent news articles too numerous to cite in this Reply, as well as the Government's current regulatory efforts, and the Government's policy statements as enunciated by the Clinton Administration regarding "privacy" on the "Information Super Highway," underscores the imperative public importance of the issue now before the Supreme Court.

In summary, Petitioners have established that unauthorized interception and search did occur, through both the Government and the Intermediary Banks own admission.[14] Thus the Consolidate Bank Case and the All Funds Case, must be reviewed with the Intermediary Bank Case, and all three actions be remanded to Judge Weinstein for consideration of the alleged violations of the ECPA.

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[14]The Intermediary Banks admit they failed to comply with the instructions contained in every third party transfer going to the Republic of Colombia, including those of the Atlantico Group, based only on the verbal instructions from the United States Attorney for the Eastern District of New York and general self executing in rem warrant, (Banks Br. at 3, 4). Furthermore, the Government admits that, "[h]ere the government did not intercept the EFT transmission while they occurred, but instead simply directed the intermediary banks not to credit the EFTs to the Colombian corresponding banks." (Gov't Br. at 12). Although this latter admission is an excellent example of sophistry, it does not obscure the reality that this in fact was the procuring of the interception prohibited under 18 U.S.C. § 2511(1)(a) and (3)(a).

III. THE INTERMEDIARY BANKS WERE ACTING AS AGENTS OF THE GOVERNMENT, NOT THE COURT, WHEN THEY PLACED "STOP QUES" IN THEIR COMPUTER MODEMS, AND PERMITTED SEARCHES OF ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT AND IN COMPUTER STORAGE GOING TO THE REPUBLIC OF COLOMBIA, BASED ONLY ON A GENERAL IN REM ADMIRALTY WARRANT AND VERBAL ORDERS OF MESSRS. HUI AND BROWN.

In both the All Funds Case, and the Intermediary Bank Case, the Court of Appeals affirmed the Judge Weinstein's denial of all discovery on all issue relating to the alleged interception and disclosure of information in computer storage (Lod. 15 and Lod. 18), and good faith, and dismissed the complaints based on its use of the "relation back doctrine," prior to final judgment based on the Consolidated Bank Case, which the Second Circuit refuses to reinstate. However, this use of the "relation back doctrine," was rejected in Buena Vista.

As noted above this based on due process these holdings must be reviewed by the Court as requested by the Atlantico Group.

CONCLUSION

Based on the above, the Petitions of the Atlantico Group for writ of certiorari should be granted in accordance with 28 U.S.C. § 2801(e) and Rule 11 of the Supreme Court Rules.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

Nos. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioners,

v.

United States of America,

Respondent.

Abuchaibe Hnos. Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

Respondents.

Comercial Samora Ltda.,

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v.

United States of America, and Banco Atlantico,

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BEST AVAILABLE COPY

Industrias Marathon Ltda.,

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United States of America, and Manufacturers Hanover Trust Company,

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Manufacturera del Atlantico Ltda., and Manufacturas Internacionales Ltda.,

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United States of America, and Manufacturers Hanover Trust Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL BRIEF

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Nos. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073

IN THE
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL BRIEF

Petitioners Manufacturera Del Atlantico Ltda., Industrias Marathon Ltda., Abuchaibe Hnos. Ltda., Manufacturas International Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comerc-

ial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda. (hereinafter the "Atlantico Group"), file this joint supplemental brief to call the attention of the Supreme Court to the recent decision of the United States Court of Appeals for the Second Circuit in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993) (hereinafter the "Intermediary Bank Case").

I. AS A RESULT OF THE SECOND CIRCUIT'S HOLDING IN THE INTERMEDIARY BANK CASE, THE ATLANTICO GROUP'S COUNTERCLAIM IN THE ALL FUNDS CASE AGAINST THE GOVERNMENT FOR VIOLATION OF 18 U.S.C. § 2701 ET AL., MUST BE REMANDED FOR FURTHER CONSIDERATION.

In the Intermediary Bank Case the Second Circuit remanded to the District

Court the claim against the Government under 18 U.S.C. § 2707(a), for alleged unauthorized access to electronic fund transfer communications; but refused to permit a civil action against Banco Atlantico and the Bank of New York (hereinafter "Intermediary Banks), based on Judge Weinstein's decision in Manufacturas International, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal pending, No. 92-7360 (2d Cir. 1992)(hereinafter the "Consolidated Bank Case")(App. A-6a).[1]

Apart from the Fifth Amendment due process challenges already raised in the Reply Brief as to the Second Circuit use of the Consolidated Bank Case as res

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[1]"App. A- " references are to the section and page number in the attached Appendix.

judicata when it refuses to reinstate the pending appeal; the Atlantico Group now also argue that based on the holding in the Intermediary Bank Case (App. A-8a), their counterclaim against the Government in United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case") (App. 1b) under 18 U.S.C. § 2701 et al., must be remanded.

II. BECAUSE CONGRESS UNDER 18 U.S.C. § 2703(a), PLACED A HIGHER STANDARD OF PRIVACY FOR ELECTRONIC COMMUNICATION HELD IN COMPUTER STORAGE FOR LESS THAN 180, UPON REMAND THE "EXCLUSIONARY RULE" UNDER BOTH 18 U.S.C. §§ 2515 AND 2518(9) APPLIES IN THE ALL FUNDS CASE.

Since a parallel currency market has not existed in the United States since the Articles of Confederation were revoked by the enactment of the United States Constitution, the Government was successful in confusing the jury by al-

luding to past transfers to different claimants from the parallel currency market.

Because electronic communication messages stored by the Intermediary Banks in their capacity as electronic communication services for fewer than 180 days are intended to facilitate in transit communication, Congress provided the same level of privacy as it required for in transit communication, House Report No. 647, 99th Congress, 2nd Session, at page 68 (1986).[2]

Therefore, on the remand of the All Funds Case the Government must show that they obtained access to the Atlantico Group's electronic communications in

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[2]See §19.5, at p. 375, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991) (hereinafter "The Law of Electronic Commerce").

transit or in computer storage by a warrant issued by a judge under the Federal Rules of Criminal Procedures pursuant to 28 U.S.C. § 2518 and 18 U.S.C. § 2703(a).

Otherwise all evidence of the Atlantico Group's previous receipt of funds from the parallel currency market must be excluded.[3]

The Government would not prevail when the All Funds Case is remanded because the Government's use of their access to previously transmitted electronic fund transfer communications which were in the Intermediary Banks computer storage for less than 180 days, and which were obtained without a war

[3]Atlantico Group still maintains that the Fourth Amendment exclusionary rule is also applicable in this in rem forfeiture action. See 18 U.S.C. § 2518(10)(c), and One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965), on remand 418 Pa. 457, 211 A.2d 536.

rant issued under the Federal Rules of Criminal Procedure, was the key element in obfuscating the fact that the Government had no evidence showing that each of the Atlantico Group's intercepted electronic fund transfer had no connection to any illegal activity (Claimants Trial Exhibits 4, 5, 6, 7).

CONCLUSION

The Supreme Court has now before it three cases which clearly bring into focus the actions of the Government and the Intermediary Banks to circumvent the provisions of Electronic Communications Privacy Act as mandated by Congress.

Thus this Petition seeks review of the Second Circuit's interpretation of this law enacted by Congress specifically to address the future legal and commer-

cial issues raised by the new technology of electronic data interchange.

Therefore, the Supreme Court has an opportunity before it to confirm the mandates of Congress as enacted in the Electronic Communication Privacy Act, regarding information technology which effect a comprehensive reformulations of the interrelationships for the future among law, government and international commerce.

Based on the above the Petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1498 -- August Term 1992

(Argued May 3, 1993 Decided *Feb 24, 1994*)

Docket No. 93-6019

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ORGANIZACION JD LTDA., and MANUFACTURAS JD, LTDA.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION OF THE UNITED STATES OF AMERICA; BANCO ATLANTICO, S.A.; THE BANK OF NEW YORK,

Defendants-Appellees.

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B e f o r e : MESKILL, WALKER,[1]

Circuit Judges, and

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[1] The Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, sitting by designation.

MOTLEY, District Judge.

Plaintiffs brought a civil damages action alleging statutory and constitutional violations arising out of governmental seizure of numerous electronic fund transfers alleged to involve proceeds from illicit drug trafficking. The United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge) dismissed the complaint in its entirety.

Affirmed in part, vacated in part, and remanded.

ISIDORO RODRIGUEZ, Barranquilla, Columbia S.A., for Plaintiffs-Appellants.

GARY R. BROWN, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Varuni Nelson, Jennifer C. Boal, Arthur P. Hui, Assistant

United States Attorneys, of counsel), for Defendants-Appellees U.S. Department of Justice and Drug Enforcement Administration of the United States of America.

MARK SULLIVAN, New York, New York (Townley & Updike, of counsel), for Defendant-Appellee Banco Atlantico, S.A.

MICHAEL D. POVMAN, New York, New York, for Defendant-Appellee the Bank of New York.

Per Curiam:

The facts of this case have been set forth thoroughly in a related appeal previously decided by a panel of this court, familiarity with which is assumed. See United States v. Daccarett, 6 F.3d 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993) (No. 93-1020). Daccarett centered around the 1990 government seizure of numerous electronic fund transfers ("EFTs")

alleged to involve the proceeds of illicit drug trafficking, totalling over $12 million. After a two-month trial, a jury found eighteen of twenty-two seized amounts forfeitable. Notably, the jury found that the amounts claimed by the appellants in this case, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda, were not traceable proceeds of illegal money-laundering and narcotics transactions. See United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984, 993 (E.D.N.Y. 1992) (Weinstein, J.) ("All Funds") (affirmed by Daccarett, supra).

The intended recipients of these various money transfers did not sit by quietly when their funds were seized. These parties sued the intermediary

banks for violations of various federal and state statutes. The district court granted summary judgement for the banks, holding that they could not be held liable for following governmental orders respecting claimed governmental funds. See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. 180 (E.D.N.Y 1992) (Weinstein, J.). In another action, various recipients sued the government attorneys who had ordered the banks to seize the funds; the same district judge dismissed this complaint for failure to state a claim. See Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

Plaintiffs in this case are two of the appellants from the Daccarett case, which affirmed the district court's

rulings in the All Funds case. Before trial in the All Funds case, plaintiffs brought a six-count civil complaint against two government agencies and two private banks charging them with statutory and constitutional violations arising from the seizures of the EFTs. Prior to the jury trial in the underlying All Funds case, the district court (Jack B. Weinstein, Judge) granted the defendants' motion to dismiss the plaintiffs' complaint, stating from the bench that its ruling was based on the reasons stated in its two earlier decisions in Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., supra, and United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, No. CV 90-2510, 1992 U.S. Dist. LEXIS

1881 (E.D.N.Y. Feb. 19, 1992) (a pretrial ruling denying the claimants' motions to vacate the district court's earlier finding of probable cause for the seizures and refusal to suppress certain evidence). Plaintiffs now appeal.

In Daccarett, this court comprehensively explored the legal issues surrounding the All Funds seizures and affirmed the rulings of the district court. Consequently, our discussion of the issues raised by this appeal is brief. For the reasons stated below, we affirm in part the dismissal of the complaint and remand for further proceedings consistent with this opinion.

The Civil Complaint

Counts One and Six of the plaintiffs' civil complaint allege violations of the Fourth and Fifth Amendments of the United States Constitution. This court in Daccarett affirmed the district court's ruling that the seizures did not violate the Fourth Amendment of the Constitution, See Daccarett, 6 F.3d at 49, and that ruling controls here.

Although Daccarett did not discuss the Fifth Amendment, the Supreme Court's latest pronouncement in this area makes it clear that civil forfeitures can violate the Fifth Amendment as well. See United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499-500 (1993). In James Daniel Good, the Court considered whether, in the absence of exigent circumstances, the Fifth

Amendment prohibited the government in a civil forfeiture case from seizing assets without first providing notice and an opportunity to be heard. The Court held that the Fifth Amendment was implicated in civil forfeitures. Id. at 500. Analyzing the civil forfeiture procedure under the three-pronged balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), the Court ruled that absent exigent circumstances, the government cannot seize an individual's real property via the civil forfeiture mechanism without providing predeprivation notice and an opportunity to be heard. Id. at 501-05.

Because James Daniel Good involved real property, the Court did not address whether personal property is similarly protected by the Fifth Amendment. We

need not decide this issue here, however, because the seizures in this matter plainly involved exigent circumstances, and the James Daniel Good Court made clear that seizures involving exigent circumstances are exempted from predeprivation notice and hearing requirements. Id. at 500. As the Daccarett court reasoned, "[b]ecause the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here." Daccarett, 6 F.3d at 49. Thus, the plaintiffs can claim no Fifth Amendment violation.

Count Two of the complaint alleged two distinct violations of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 et

seq., which govern interception of wire electronic communications, and §§ 2701 et seq., which govern access to certain stored electronic records. First, plaintiffs claim that they are entitled to civil damages under § 2520 for the alleged unlawful "interception" of the EFTs. However, the Daccarett court ruled that the seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). See Daccarett, 6 F.3d at 54. Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520.

Second, plaintiffs claim they are entitled to civil damages under § 2707(a), which provides a civil cause of action for the unlawful access to stored communications in violation of § 2701.

The statute states:

> **(a) Cause of action.** -- Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or international state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C § 2707(a). We agree with the district court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d) (1). See Manufacturas Int'l, Ltda v.

Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

However, the government agencies' potential liability under § 2707 is a different matter. Few courts have addressed the complex issues surrounding the government's possible liability under § 2707(a). We note that the district court's two decisions upon which it relied when ruling from the bench to dismiss the plaintiffs' complaint had no occasion to discuss the government's liability under § 2707(a).

As an initial matter, we address whether a governmental entity can be held civilly liable under § 2707(a). To our knowledge, only two district courts have discussed this question, both of which suggested that a governmental "entity" may be liable under § 2707.

See PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 823 (D.N.J. 1993); Bodunde v. Parizek, No. 93-C-1464, 1993 U.S. Dist. LEXIS 7365 (N.D. Ill. May 27, 1993). Those courts concluded that prior to the 1986 enactment of the ECPA, the definition of "person" in § 2510(6) already included business entities such as corporations and partnerships, and that in order to give full meaning to the new statutory language, "entity" must be taken to mean governmental entity. They have found support for this conclusion in legislative history that specifically references "governmental entities" as potentially liable under § 2707(a). See S. Rep. No. 541, 99th Cong., 2d Sess.43 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3597 (stating that an aggrieved

party "may recover from any person or entity -- including governmental entities -- who knowingly or intentionally violated this chapter"). We find the analyses of these courts persuasive and hold that governmental "entities" are subject to liability under § 2707(a).

Apart from this determination, two issues remain: whether the particular plaintiffs in this case are able to bring an action under § 2707(a), and whether the government agents impermissibly violated the ECPA. Because the resolution of these issues requires a more complete factual record, we remand the § 2707(a) claim under Count Two against the government defendants for an initial determination by the district court.

We offer several observations for the benefit of the district court on remand. First, § 2707(a) confines those who may recover damages to "any provider of electronic communication service, subscriber, or customer aggrieved." Plaintiffs here were to be ultimate beneficiaries of sequential electronic fund transfers. Whether plaintiffs fit within the class of individuals who may bring suit under § 2707(a) is an open question that might well turn on the issue of whether the term "customer" applies to the plaintiffs in the factual circumstances presented here.

Second, if the district court should find that plaintiffs fit within the class of "any provider of electronic communication service, subscriber, or customer aggrieved" under § 2707, a

matter as to which we express no opinion, then the court must decide whether the governmental agents in this case complied with the ECPA, or were somehow excused from doing so. Section 2703 of the ECPA lays out the requirements for governmental access to an electronic communication, satisfaction of which would avoid liability under § 2707(a). Because we believe the district court is in the best position to consider these questions and make appropriate findings of fact in the first instance on remand, we take no position on the merits of this aspect of plaintiffs' § 2707(a) claim against the government.

Counts Three and Four of the complaint alleged breach of contract claims against the defendant banks.

Plaintiffs claim that by failing to forward the wire transfers, the intermediary banks failed to follow the wire transfer rules and regulations of the Federal Reserve System and the Clearing House Interbank Payment System, and that this "breach of contract" caused them damage. In essence, the plaintiffs claim third-party beneficiary status to the contract between the intermediary banks and the wire transfer systems.

Irrespective of whether the plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforceable contract

impossible to perform. See, e.g., RSB Mfg. Corp. v. Bank of Baroda, 15 B.R. 650 (S.D.N.Y. 1981) ("The defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action."); Hamilton Rubber Mfg. Co. v. Greater N.Y. Carpet House, Inc., 47 N.Y.S.2d 210, 211 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 681, 53 N.Y.S.2d 954 (1st Dep't 1945); Restatement (Second) of Contracts § 264 (1981). Accordingly, Counts Three and Four were properly dismissed.

Finally, Count Five of the complaint alleged violations of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq. However, as this court explained in Daccarett, the RFPA was "meant to protect those who

maintain accounts in their names at financial institutions," and because the plaintiffs "never maintained accounts in their names at the intermediary banks," there was no violation of the RFPA. 6 F.3d at 51-52 (emphasis in original). Thus, the RFPA provides no basis for relief and Count Five, too, was properly dismissed.

Conclusion

For the foregoing reasons, we affirm the dismissal of the civil complaint on Counts One, Three, Four, Five, and Six, and Count Two in part. We vacate and remand that part of Count Two which alleged a claim for civil damages against the government under § 2707(a) for further proceedings consistent with this opinion.

Parties to bear their own costs.